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Supreme Court, U.S.
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No. 90-

In the Supreme Court of the United States

OCTOBER TERM, 1990

COLEGIO DE ABOGADOS DE PUERTO RICO,
PETITIONER,

v.

ROBERT E. SCHNEIDER; HECTOR RAMOS; ORESTE V. RAMOS; JORGE F. ROMANY; AND JORGE SOUSS,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower federal courts, when adjudicating attorneys' constitutional attack on compelled membership in the Colegio de Abogados de Puerto Rico, may disregard the inherent power of the Supreme Court of Puerto Rico to regulate the legal profession, and ignore the Puerto Rico Court findings of fact and conclusions based on findings made in the disbarment proceedings of attorneys that resulted in a final decision of the Supreme Court of Puerto Rico in *Colegio de Abogados* v. *Schneider*, from which Respondents failed to seek review in this Court as required by the *Rooker-Feldman* doctrine.

2. Whether this Court's decision in *Keller* v. *State Bar of California* allows lower federal courts to independently review the federal constitutional validity of Puerto Rico's integrated bar, in open contradiction with a final decision of the Supreme Court of Puerto Rico which decided the very same issue after extensive hearings and after making specific findings of fact as to the bar association's organization, functions and duties, the activities that were germane to the legal profession and the administration of justice, and in which the Puerto Rico Court detailed the remedies and protection to be afforded to dissenting members.

3. Whether the lower federal courts acted impermissibly by, in effect, compelling the Colegio de Abogados to disregard the mandate issued by the Puerto Rico Supreme Court after its final decision in *Colegio de Abogados* v. *Schneider*, and creating an unnecessary confrontation between the federal and commonwealth judiciaries that violates the basic principles of the abstention doctrine.

4. Whether the Colegio de Abogados de Puerto Rico, as an integrated bar, is a state actor for purposes of 42 U.S.C. § 1983, because, as held in *Keller*, the essentially advisory services rendered by the bar do not project the entity into the formulation of policies or into the execution of endeavors traditionally reserved to government agencies.

PARTIES TO THE PROCEEDINGS

Petitioner, who was one of the appellants below, is Colegio de Abogados de Puerto Rico. Other appellants, the Secretary of Justice and the Secretary of the Treasury of the Commonwealth of Puerto Rico, are to file a separate Petition.

Respondents, who were appellees below, are Robert E. Schneider; Hector Ramos; Oreste V. Ramos; Jorge F. Romany; and Jorge Souss.

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Opinions Below

The final opinion of the Court of Appeals was entered on October 24, 1990 and appears reprinted in Appendix A at page A-1. The order of the Court of Appeals denying the Petition for Rehearing with the suggestion for rehearing en banc was entered on December 20, 1990 and appears reprinted in Appendix B at page A-37. The court of appeals opinion in *In re Justices* appears in Appendix C at page A-39. The court of appeals opinion in *Romany* v. *Colegio de Abogados de Puerto Rico* appears in Appendix D at page A-58. The opinions of the

district court appear reprinted in Appendixes E, F, G, and H at pages A-82, A-125, A-164, and A-180 respectively. The opinions of the Supreme Court of Puerto Rico appear reprinted in Appendixes I and J.

Jurisdiction

The opinion of the Court of Appeals was entered on October 24, 1990. The Order of the Court of Appeals denying the petition for rehearing en banc was entered on December 20, 1990.

This Court has jurisdiction to review the judgment or decision of the Court of Appeals for the First Circuit under 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions Involved

The First Amendment of the Constitution of the United States provides that:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The law constituting the Colegio de Abogados de Puerto Rico, 4 L.P.R.A. §§ 774, 775, 781, 783 (1978), Appendix L at A-301.

The law requiring that Colegio de Abogados stamps be affixed to instrument drawn by notaries, 4 L.P.R.A. §§ 1006, 1038 (1978), Appendix M at A-304.

Statement of the Case

This controversy originated on November 27, 1977, when the Colegio de Abogados de Puerto Rico (Colegio) requested that the Supreme Court of Puerto Rico discipline 99 attorneys, including the five respondents herein, to pay their dues as members of the bar as required by 4 L.P.R.A. §§ 774, 775, 780.

After the appropriate proceedings, all attorneys paid their dues except Robert E. Schneider and Hector R. Ramos, two of the respondents herein. They averred that the law compelling membership, as well as that requiring payment of the forensic and notarial stamps, were unconstitutional under both the United States and the Puerto Rico Constitutions.

The Supreme Court of Puerto Rico, in an opinion written by then Chief Justice Trias Monge, comprehensively addressed the issues raised by Schneider's and Ramos' objections. *Colegio de Abogados de Puerto Rico* v. *Schneider*, 112 PR Dec. 540 (1982).[1] Citing *Lathrop* v. *Donohue*, 367 U.S. 820 (1961), the Puerto Rico Supreme Court upheld the constitutionality of compulsory bar membership and publicly compelled financial support through payment of dues and cancellation of stamps. However, citing *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977), the Court also held that attorneys had a right "to raise objection to the use of their contributions or part thereof for ideological activities they do disapprove."

The Colegio was ordered to draft a remedy to protect dissenting members' rights according to a set of guidelines established by the Puerto Rico Supreme Court that required compliance with U.S. Supreme Court precedents such as *Abood*. *Id.* The Puerto Rico Court retained jurisdiction to deal with the remedy that had to be drawn.

Soon thereafter, on June 9, 1982, Schneider and Ramos filed a civil rights action under 42 U.S.C. § 1983 in the U.S. District Court for the District of Puerto Rico against the Colegio, the Commonwealth Secretaries of Justice and the Treasury. Respondents challenged on federal constitutional grounds, compulsory bar membership and publicly compelled financial support of the Colegio.[2] Three other respondents, Jorge F.

[1] The whole official translation is found in Appendix I at pages A-221—A-240.

[2] Respondents also sued the Justices of the Commonwealth Supreme Court. The Court of Appeals dismissed the claims against them "insofar as they involve Puerto Rico's system of compulsory bar membership and compulsory payment of bar dues." *In re Justices*, 695 F.2d at 27. Regarding the stamp litigation, the court considered the Justices to be "nominal parties." *Id.*

Romany, Jorge Souss Shidrewa and Oreste V. Ramos Diaz, also filed substantially similar claims, and all four cases were consolidated.

The Colegio submitted to the Puerto Rico Supreme Court for its approval the proposed remedy the court had ordered it to devise. Before the Puerto Rico Court could express itself about the proposed remedy's validity, the District Court issued a judgment declaring the challenged bar statutes unconstitutional "as applied," and enjoining defendants from enforcing them. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963 (D.P.R. 1983).

In *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984) the Court of Appeals vacated the judgment of the District Court and ordered the District Court to abstain while retaining jurisdiction. The Circuit Court held that "the Supreme Court of Puerto Rico must be allowed an opportunity to *complete the process initiated but not completed in its opinion of April 5, 1982*," 742 F.2d at 40-41 (emphasis added), i.e., review the Colegio's proposed remedy, and accept, reject or modify it.

The proceedings that took place before the Commonwealth Supreme Court after the Circuit Court's mandated abstention, and which resulted in the remedy at issue herein are set forth in *Colegio de Abogados* v. *Schneider*, 117 D.P.R. 540 (1986), Official Translation at Appendix J, A-243—A-264, and merit no repetition. Several of its aspects deserve emphasis. At a prehearing conference held on January 4, 1985 before the Special Master appointed by the Puerto Rico Court to receive evidence, Respondents Oreste Ramos, Jorge Romany and Jorge Souss refused to participate any further in the proceedings. The case then continued with the full participation of respondents Schneider and Hector Ramos.

Evidentiary hearings were held on January 15 and 22, February 4, 5 and 6, and March 11, 13, and 25, 1985. Colegio presented extensive testimony and documentary evidence that was never controverted by plaintiffs Schneider and Ramos.

These two respondents presented in evidence the record of the proceedings in the previous federal court case. None of the respondents made any *England* reservation of federal claims or federal forum.

On June 26, 1986 the Commonwealth Surpreme Court, per Chief Justice Pons Nunez, issued its opinion and established the Remedy which called for the protection of dissidents' rights. The Puerto Rico Court made extensive findings of fact to complement the findings made in its previous decision, as well as those in the District Court's 1983 opinion in the *Schneider* 1983 Decision. Such fact finding was necessary, the Court held,

> [B]ecause the analysis of the Federal Court only extracted, from the evidence brought before it, those examples which in its opinion evidenced ideological or politico-partisan activities. Said Court did not deem it convenient to describe the manifold character of the Bar Association, of its other activities, or the proportion of resources devoted to them. App. at A-249.

From a meticulous analysis of the evidence before it, the Supreme Court concluded "that the so-called ideological [activities] are only a minimum vis-a-vis all the work performed by the Bar Association". The record also shows that the Supreme Court appended to its 1986 opinion a catalog of all the evidence evaluated by the Court. Subsequently this evidence was brought by the Colegio from the Supreme Court to the District Court but no portion thereof was submitted by respondents as evidence nor taken into evidence by the District Court.

The Puerto Rico Court then fashioned the remedy providing dissenting bar members with an effective instrument to protect their rights. The Court devised the remedy in light of the Puerto Rico Constitution, the standards set by the U.S. Supreme Court precedents it deemed applicable,[3] and the

[3] The Court based its opinion on *Machinist* v. *Street*, 357 U.S. 740 (1961); *Lathrop* v. *Donohue*, 367 U.S. 820 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963); *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977); *Ellis* v. *Railway Clerks*, 466 U.S. 1883 (1984); *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986).

court's inherent judicial power to regulate the legal profession in Puerto Rico. Subsequently, the Court rejected Schneider and Ramos' motion for rehearing which raised objections to the remedy based on the constitutional arguments they have insisted on throughout this litigation. Indeed, Mr. Schneider admitted to the District Court at a later hearing held on May 19, 1989, that the Supreme Court proceedings substantially afforded the plaintiff the remedy they were seeking.

Plaintiffs then sought relief before the District Court and reactivated the federal case. At a status conference held on November 21, 1986, the District Court ordered the parties to file memoranda discussing the effect that the 1986 Puerto Rico Supreme Court decision had over the federal case. After the parties filed their submissions, the district court reopened the case and held a pretrial conference on June 17, 1987. Respondents indicated to the district court that the only issue was one of *law*, whether the remedy provided by the Supreme Court was constitutional or not. This was repeated at the last hearing and is also the position of the district court in its last opinion. Neither at the pretrial, nor at any other time, after the 1986 remedy was issued, did the plaintiffs reframe their claims as suggested by the Court of Appeals in *Romany*, 742 F.2d 32 at 44. The Colegio then moved for dismissal on the same jurisdictional grounds that were raised at the pretiral conference. The District Court erroneously denied the motion, *see*, *Schneider* v. *Colegio de Abogados de Puerto Rico*, 670 F. Supp. 1098 (D.P.R. 1987), and after a hearing that the District Court indicated might have been unnecessary, it entered judgment for the plaintiffs and issued an injunction.

The petitioner appealed to the Court of Appeals for the First Circuit arguing that the district court lacked jurisdiction; that any appeal from the Supreme Court of Puerto Rico remedy could only be taken to the Supreme Court of the United States; that the declaratory and injunctive relief was improperly granted to regulate past conduct and was based on stale

evidence; that the injunction was addressed to entities and persons who had no control over the remedy established by the Supreme Court of Puerto Rico; that the district court had improperly disregarded the findings of the Supreme Court of Puerto Rico and substituted its own interpretation about the scope of the functions and germane activities in which the Colegio could engage.

While the appeal was pending but after arguments were heard, this Court rendered its opinion in *Keller* v. *State Bar of California*, 495 U.S. __, 110 L.Ed2d 1, 110 S.Ct. 2228. The Court of Appeals rendered its decision on October 24, 1990. The court affirmed the district court's judgment in part, reversed it in part and modified it and remanded it for further proceedings. The Court of Appeals rejected all jurisdictional challenges; found that the statute and the decision of the Supreme Court of Puerto Rico define too broadly the range of activities that may be funded with compulsory dues; and granted the Colegio de Abogados and the Secretaries six months to submit a "modified version of its rule, or an alternative (one)"; finally, the injunction to be entered if the above is not done will bar the Colegio "from compelling membership until it either ceases all ideological activities not germane to its core purposes or *devises an adequate system to protect dissenters' rights*". The Court of Appeals therefore, disregarded the system devised by the Supreme Court of Puerto Rico and ignored the fact that neither the Colegio nor the Secretaries may change a remedy that was, after extensive hearings, adjudicated by the Supreme Court to satisfy the claims made by respondents.

The Colegio de Abogados then filed a petition for rehearing with a suggestion that it be reheard en banc. The petition was denied, and the order was entered on December 20, 1990.

REASON FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH ARTICLE III OF THE CONSTITUTION AND WITH APPLICABLE DECISIONS OF THE SUPREME COURT CONCERNING JURISDICTION.

A. *Federal jurisiction is lacking since respondents failed to appeal any adverse ruling or insufficient remedy to the Supreme Court of the United States — the only court which may review decisions of said nature under the* Rooker - Feldman *doctrine; jurisdiction is also lacking, since respondents failed to properly reserve before the Supreme Court of Puerto Rico any federal claim.*

1. *The district court lacked jurisdiction to entertain this suit under the Rooker - Feldman doctrine.*

The intervention by the federal courts below constitutes a *de facto* second unwarranted attempt to review a decision by the Supreme Court of the Commonwealth of Puerto Rico.[4] In so doing, the courts have nurtured the sort of conflicts and frictions between the federal and state court systems which both Congress and this Court have constantly attempted to diminish and avoid. At the same time, the Federal incursion into an area of regulation of the legal profession — where important state interests abound, *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423, 434-5 (1982), in effect sanctions Respondents' forum shopping between the two court systems. See, *Atlantic Coast Line Co.* v. *Brotherhood of Loc. Eng.*, 398 U.S. 281, 287 (1970), favorably citing *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Packing Co.*, 309 U.S. 4 (1940).

The ban on federal court review of state court judgments is a firmly established doctrine, *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 416 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), which has been described as "of great importance in protecting fundamental principles of

[4] The first attempt, *Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F.Supp. 963 (DPR 1983), was expressly vacated by appeals court's decision in *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32, 45 (1st Cir. 1984).

federalism." Tribe, *American Constitutional Law*, p. 202, n.4 (2d ed. 1988); see Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 Hastings L.J. 1337 (1980). Just as review of final decrees or judgments of the highest courts of the State corresponds to the Supreme Court of the United States, 28 U.S.C. § 1257 (1988), review of the final judgments of the Supreme Court of the Commonwealth of Puerto Rico also, correspond to this Court. 28 U.S.C. § 1258; *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

Throughout the long history of this case it has been defendant's unflagging position that the holding in *Rooker*, and its progeny, stand as a jurisdictional barrier to the exercise of jurisdiction by the district court.

Civil rights actions brought pursuant to 42 U.S.C. § 1983 by individuals denied admission to state bars have been deemed subject to the *Rooker* restriction. A plaintiff cannot, therefore, clothe his grievance "in the garb of 1983 . . . alleging that the decision of the state court deprived [him] of constitutionally protected rights or interests." *Dasher* v. *Supreme Court of Texas*, 650 F.2d 711, *Opinion withdrawn and substituted, on other grounds*, 658 F.2d 1045, 1046 (5th Cir. 1981); *Doe* v. *Pringle*, 550 F.2d 596, 599 (10th Cir. 1976).

A further jurisdictional consideration operates in Section 1983 actions involving attorney discilpine. *Feldman* established that "United States district courts . . . have jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, *which do not require review of a final state court judgment in a particular case.*" (Emphasis added) 460 U.S. at 486. Accordingly, the district court lacks jurisdiction if as happened here the Commonwealth Supreme Court proceedings in *Colegio de Abogados de Puerto Rico* v. *Schneider*, 117 P.R. Dec. 540 (1986), were of a judicial nature, or if the district court decided respondents' challenge to state bar rules promulgated by the Commonwealth Supreme Court by reviewing a final decision of such Court.

2. *The Puerto Rico Supreme Court proceedings were Judicial in Nature.*

The determination of whether proceedings are judicial or not, for the purpose of establishing jurisdiction is, of course, a matter governed by federal law. *Hermandad-Union de Empleados del Fondo* v. *Monge*, 613 F.Supp. 96, 99 (D.P.R. 1985), see, *In Re Summers*, 325 U.S. 564, 566 (1945). The adversarial nature of the proceedings is one of the factors which the Court will consider in determining its judicial or non-judicial nature. See, *In Re Summers*, 325 U.S. at 568. Bar member disciplinary proceedings are considered judicial in nature. *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. at 433-34.

The decision of the Supreme Court of Puerto Rico in *Colegio de Abogados* v. *Schneider*, 112 D.P.R. Dec. 540 (1982) was unequivocally adjudicative in its nature and as such constituted judicial proceedings for purposes of 28 U.S.C. § 1738. The Court of Appeals noted in *In Re Justices*, 695 F.2d 17 (1st Cir. 1982) that *whenever* the Supreme Court of Puerto Rico acts upon a complaint filed before it based on nonpayment of dues "the Justices act as they should in any other case based upon a Commonwealth statute: they sit as adjudicators, finding facts and determining law in a neutral and impartial judicial fashion." 695 F.2d at 21. The final decision of the Court of Appeals of October 24, 1990 is in direct conflict with its prior opinions.

As can be seen in both opinions in *Schneider* v. *Colegio de Abodagos*, 112 P.R. Dec. 540 (1982), hereinafter *Colegio I*, and 117 P.R. Dec. 540, hereinafter *Colegio II*, the proceedings before the Commonwealth Supreme Court were of a clearly adversarial nature. As has been previously stated, these commenced with the filing of an action by the Colegio before the Commonwealth Supreme Court against 99 attorneys, including the five respondents herein, requiring payment of their

annual dues. All attorneys paid their dues except Messrs. Schneider and Ramos, who challenged both compulsory bar membership and the payment of forensic and notarial stamps under both the United States and Commonwealth constitutions. The Commonwealth Supreme Court appointed a Special Master on both occasions to receive whatever evidence the parties might wish to present. The Special Master rendered his report on September 9, 1980, in which he included a stipulation of the parties regarding the matters involved, as well as the evidence presented.

Following the *Romany* decision by the Court of Appeals ordering the district court to abstain from adjudicating the issues, the Commonwealth Supreme Court conducted extensive judicial proceedings. On November 13, 1984, the Court issued an order providing a temporary remedy, ordered a hearing to give the parties an opportunity to present evidence, and appointed a former Justice of the Court to act as Special Master. On January 4, 1985 a prehearing conference was held. On January 23, 1985 the parties signed a stipulation requesting a modification of the November 13, 1984 resolution, which was granted by the Court. An evidentiary hearing lasting eight (8) days was held during January, February and March of 1985. The Colegio presented what was described as "abundant oral and documentary evidence," which was not controverted. Attorney Schneider submitted the record before the Federal District Court as evidence before the Special Master. The Colegio presented the Special Master with a Summary and Analysis of the Evidence, Findings of Fact, Conclusions of Law and a proposed remedy. Attorneys Schneider and Ramos raised objections to the Colegio's proposed findings of fact and conclusions of law and presented their own counterproposal of findings of fact and conclusions of law. After the corresponding briefs were filed, the case was taken under advisement in March, 1987. The Commonwealth Supreme Court, as can be seen from the previous summary of proceedings, was clearly

involved in the investigation, declaration and enforcement of liabilities as they stood on actual or prior facts. The courts below deny this fact but it is plain and simple that the judicial nature of the remedy is the only appropriate interpretation of the proceedings before the Commonwealth Supreme Court.

The courts below nonetheless ignored the true nature of the Commonwealth Supreme Court proceedings and took the expedient approach of splitting those proceedings into two alleged distinguishable and separate parts. Pursuant to this unrealistic scenario, one stage, considered judicial in nature, commenced prior to the 1986 remedy and to the reinstatement of attorneys Schneider and Ramos. The other stage considered to be a "rule making proceeding," apparently commenced with the reinstatement of said attorneys and ended with the 1986 remedy, *Schneider* v. *Colegio de Abogados*, 670 F.Supp. at 1102.

The District Court's erroneous conclusion that *Colegio de Abogados I* ended the adjudicative aspect of the present controversy "so that the 1986 opinion is pure rulemaking," *Colegio de Abogados II*, 670 F.Supp. at 1103, mistakenly seeks support for its "bifurcated theory" on dicta from *Zimmerman* v. *Grievance Com. of Jud. Dist.*, 726 F.2d 85, 86 (2d Cir. 1983), *cert. denied*, 467 U.S. 1227 (1984). In *Zimmerman*, the court remarked that a state court could combine in one opinion "an adjudication of a grievance complaint with a promulgation of what amounts to a new rule." 726 F.2d at 86. In *Zimmerman* the court acknowledged that "it would be inconsistent with the thrust of *Feldman* to resolve ambiguities in a state court opinion in favor of the 'promulgation' of a 'new' rule and thereby encounter a jurisdictional issue in the absence of a clear statement from the state court." 726 F.2d at 87. The Court of Appeals erroneously affirmed this view.

In 1982, the Supreme Court of Puerto Rico found that compulsory bar membership was constitutionally valid and that the Colegio enjoys ample freedom of speech. Concomitantly, the Supreme Court upheld Schneider and Ramos' right to dis-

sent from the ideological pronouncements of the Colegio and therefore to object to the use of their contributions, or part thereof, for those activities. The Court further acknowledged the need to enforce said right. The nature and scope of the constitutional infringement required the creation of a very particular remedy, a remedy tailored to the constitutional violation incurred. Cf. *Hill* v. *Gautreaux*, 425 U.S. 284, 294 (1976). The creation of such remedy protects Schneider and Ramos' constitutional rights, for it will be that remedy which "constitutes the actualization of the right." O. Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1, 52 (1979); P. Schuck, *Suing Government*, Chap. 1 (1983).

Colegio de Abogados II is the effectuation of the remedy in a process begun by the Puerto Rico court in its 1982 decision. The 1986 decision was rendered following the appointment of a special master and an evidentiary hearing in which Schneider and Ramos actively participated. Briefs were submitted by the parties before the Court and Schneider and Ramos even filed a Motion for Reconsideration once the decision was announced. The remedy issued *specifically* granted Schneider and Ramos the right to request a *refund* for any non-germane expenditures by the Colegio, thus providing relief for past wrongs.

All proceedings before the Commonwealth Supreme Court, which culminated in the 1986 remedy, including the court's remedy for attorneys who object to the Colegio's objectionable or ideological activities, therefore, represent one continuous process, a *judicial* one clearly.

3. *The Constitutional Challenge to the Remedy is inextricably intertwined with the Commonwealth Supreme Court decision and thus could not be reviewed by the District Court.*

The complaint filed by Schneider and Ramos in federal district court is an attempt to seek review of the judgment ren-

dered in 1982 in *Colegio de Abogados I* as well as the subsequent Remedy promulgated by the court in *Colegio de Abogados II* when the process initiated in 1977 came to fruition.

As stated by the Court in *Feldman*, "[i]f the constitutional claims presented to the United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state-court decision. This the district court may not do." 460 U.S. 483, n.16.

As noted above, "a state court could combine in a single opinion an adjudication of a grievance complaint with a promulgation of what amounts to a new rule." *Zimmerman*, 726 F.2d at 86. Even if the Puerto Rico Supreme Court's remedy in *Colegio II* is construed as rulemaking, it is obvious respondents' claim cannot be evaluated without reviewing said decision.

The Puerto Rico Supreme Court's 1986 remedy and its opinion are so intertwined that the courts below were forced to review important aspects of *Colegio II* in order to formulate its own decision.

Such manner of proceeding constitutes an impermissible review of the Puerto Rico court's judicial proceedings. As indicated by Justice Marshall, concurring in *Pennzoil* v. *Texaco*, 481 U.S. 1, at 25:

> [I]t is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

4. *Respondents' suit in the federal court was barred by the prior judgment of the Puerto Rico Supreme Court.*

In *Feldman*, the Supreme Court recognized the possibility that a constitutional challenge to state bar rules which had been preceded by state court bar admission proceedings could be foreclosed by the doctrine of res judicata, 460 U.S. at 487-8, or "claim preclusion as the term is frequently being referred to." *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75 (1984).

It is clear that 28 U.S.C. § 1738 "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). The fact that the rights sought to be vindicated are of a federal constitutional nature, and that the action is in the nature of a § 1983 suit, do not diminish their effect. The bar applies both to issues adjudicated in prior proceedings, as well as to issues that could have been but were not raised in an earlier suit. *Allen* v. *McCurry*, 449 U.S. 90 (1980); *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75 (1984).

This court has set forth clear and explicit rules concerning claim preclusion. In *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) *("England")* the Court created the right to reserve the federal forum as an accommodation between the duty of federal courts to accept jurisdiction of federal cases, and the policy of abstention. See *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 83-85 (1984), *Allen* v. *McCurry*, 499 U.S. 90, 101 n.17 (1980). The record before the Puerto Rico court clearly shows a total absence of any attempt at making such reservation after the Court of Appeals' mandated abstention.

In *England*, the Court established what it considered a

bright and clear line: A litigant shunted by abstention to state court must inform that court what his federal claims are "for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." *Id. at* 421. Moreover, the Court "explicitly" held that if a party freely and without reservation submits his federal claims for decision by the state courts, "he has elected to forego his right to return to the District Court." *Id.* at 419. *See also*, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 427-28 (1983).

In the case at bar, none of the respondents complied with either *England* or *Windsor*. Indeed, respondents Schneider and Ramos submitted to the Supreme Court of Puerto Rico as evidence in their favor the record of the case before the federal court, and such record was received in evidence and considered by the Puerto Rico court upon making its decision. *Colegio de Abogados II* (Official Translation at 6-7, A-248—A-249.).

As to the other respondents, their failure to comply with *England* and *Windsor* is even more egregious. After the Court of Appeals mandated abstention, they simply withdrew from the judicial proceedings before the Commonwealth Supreme Court, and did not seek any other remedy in any other Commonwealth court. See *Colegio de Abogados II* Official Translation at 5, A-247. In sum, these other respondents simply waived their rights, and implicitly agreed to have the court determine the proper remedy as to them on the basis of respondents Schneider's and Ramos' presentation of the facts and the legal issues.

Having freely and without reservation, submitted their federal claims for decision by the Commonwealth Supreme Court, *Colegio de Abogados II* precludes respondents relitigating the issues of fact and the federal claims decided by the court, as well as those they failed to submit.

B. *The courts below erred because, as jurisdiction was lacking under 42 U.S.C. § 1983, if the Puerto Rico Justices acted as either judges or legislators, under* Supreme Court of Virginia *v.* Consumer Union, *the courts were barred from awarding damages, declaratory or injunctive relief as to petitioner, who at all times acted according to the orders of the Puerto Rico Supreme Court.*

1. *The Colegio is not a state actor for purposes of 42 U.S.C. Section 1983.*

The District Court in *Schneider*, 565 F.Supp. 963, 973-974 (1983) concluded that the Colegio's actions were state action because of the "Colegio's symbiotic relationship to the various branches of the Commonwealth . . ." The Supreme Court in *Keller* v. *State Bar of California*, 495 U.S. ____, 110 L.Ed.2d 1, 110 S.Ct. 2228, rejecting the determination by the Supreme Court of California that the State Bar of California was a government agency, expressed a view fatally different from that expressed in *Schneider*, supra.

The Court in *Keller* stated, 110 L.Ed.2d at 12-13,

> The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies." Its principal funding comes not from appropriations made to it by the legislature, but from dues levied on its members by the Board of Governors. Only lawyers admitted to practice in the State of California are members of the State Bar, and all 122,000 lawyers admitted to practice in the States must be members. Respondent undoubtedly performs important and valuable services for the State by way of governance of the profession, but those services are essentially advisory in nature. The State Bar does not admit

> anyone to the practice of law, it does not finally disbar or suspend anyone, nor does it ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court.

Keller goes on to find that there is a substantial analogy between the relationship of the State Bar and its members and the relationship of the union and its members. The basic essence of both is the difference from the typical government official or agency. They are private entities. The analysis of the Supreme Court negates any "symbiotic" approach.

If the Colegio engaged in ideological and prohibited actions as concluded by the district court, then the nature of the partial catalog of activities — collected by the Court in its 1983 opinion and reproduced in its 1988 opinion, *Schneider*, 682 F.Supp. at 678-681 — were not activities in which "government", specifically the Supreme Court or the Secretaries, insinuated themselves into a position of interdependence from which they "must be recognized as joint participants in the challenged activity". See *Morast* v. *Lance*, 807 F.2d 926, 93 (11th Cir. 1987). No finding by the District Court nor by the Court of Appeals leads to this conclusion.

The Court of Appeals has recognized, where the impetus of the alleged discrimination is private, the State must have "significantly involve[d] itself. . . ." *Davis* v. *Richmond*, 512 F.2d 201 (J. Campbell, 1975). For the same reasons, the public function test cannot apply since no delegation has been made to the Colegio of any power traditionally reserved to the State. As indicated in *Keller*, 110 L.Ed.2d at 12-13, all the functions are reserved by the law to the Supreme Court.

If the alleged violations to dissidents are due to the activities the district court and the panel have found objectionable then the third test — the nexus test — also fails the respondents. *Morast*, supra, 807 F.2d at 931. Again, the impetus of the activities is private and they can't be treated as those of the State.

As indicated by the Court in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) the nexus test is fulfilled only when the state participated in the challenged activity by "putting its weight" behind the challenged activity itself. See *Fitzgerald* v. *Mountain Laurel Racing, Inc.*, 607 F.2d 589, 597 (3rd Cir., 1979).

For the above stated arguments, jurisdiction under Section 1983 is lacking as to the Colegio.

2. *The Justices and The Supreme Court of Puerto Rico are immune.*

Necessarily, we must then turn to examine whether the Justices, and the Colegio as subrogate of the Justices, may be sued under § 1983.

The Justices in their individual capacities are immune, the court as an entity is not vulnerable to § 1983 suits because it is protected by state immunity under the Eleventh Amendment. *Harris* v. *Missouri Court of Appeals*, 787 F.2d 427, 429 (8th Cir., 1986). We submit that if respondents cannot bring the Justices or the Court as an entity under § 1983, their action must also fail as to the Colegio and the Secretaries. *Clark* v. *State of Washington*, 366 F.2d 678, *cert. den.*, 375 U.S. 986 (1966).

The District Court and the Court of Appeals have now rejected the argument that the 1986 Remedy was a judicial determination. Both courts have indicated that it was part of the rulemaking process, with the Court of Appeals concluding that the Supreme Court "invoked its inherent powers over the bar to go beyond their individual complaints to accomplish needed bar reform." (A-13).

If, as found by the Court of Appeals, the Supreme Court invoked its inherent powers over the bar to achieve overall supervision of the practice of law, then *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 at 734 (1980) teaches that the court then exercises the State's entire legisla-

tive power with respect to regulating the bar; the Justices are the legislators for all purposes of regulating the bar. In said situation the immunity extends to damages as well as to "§ 1983 actions seeking declaratory and injunctive relief." *Id.* at 732-733. Neither the Supreme Court of Puerto Rico as an entity, nor the Justices may be subject to a § 1983 action for damages or injunctive relief. This legal impossibility impedes the issuance of an injunction against the Colegio. The underlying premise is that as a "legislator" the Supreme Court is not a "person" for purposes of § 1983 jurisdiction. And, quite simply jurisdiction would be lacking in this case. See *Harris*, supra, 787 F.2d at 429. See also the discussion in *Star Distributors, Ltd.* v. *Marino*, 613 F.2d 4 (2nd Cir., 1980) cited at footnote 10 by the Court in *Consumers Union*, *supra*, 446 U.S. at 733. A panel composed of Judges Campbell, Coffin and Bownes in *Colon Berrios* v. *Hernandez Agosto*, 716 F.2d 85 (1st Cir. 1983) held that a plaintiff seeking to prove the existence of "proper case" to enjoin a legislative action "must overcome the threshold obstacle of legislative immunity" and noted that the Supreme Court clearly extends that immunity to "the impositions of equitable relief." 716 F.2d at 88.

The continuous relevance and application of these principles is a natural corollary of the conclusion by the Court of Appeals (note 10, A-14) that the question before the Court is "whether the *Rule modifies the compulsory Colegio system specified by statute* so that the system meets constitutional requirements". If that is so, there can be no doubt that the legislative function can only possibly be exercised by the Supreme Court. The Colegio is powerless to engage in any modification of a system so specified by the Supreme Court of Puerto Rico. As the Court indicated in *Consumer Union*, 446 U.S. at 734, if the sole basis for the actions were the issuance of, *or failure to amend*, the challenged rule, legislative immunity would foreclose suit. This norm applies to the case at bar as the Supreme Court and the Justices have not been im-

pleaded as enforcers or as legislators. *Pulliam* v. *Allen*, 466 U.S. 522 (1984) is of no impact to the present analysis as prospective remedy may not be granted. *See also* dissenting opinion at 544.

The Colegio acts as an arm of the Supreme Court, as an integral part of the judicial system, *Clark* v. *State of Washington*, 366 F.2d at 681. That is the reasoning to allow others absolute immunity from liability, see *Babcock* v. *Tyler*, 884 F.2d 497, 501-502; and the post-adjudicative activities are also covered, *Id.* at 503. The actions of those acting under court order of compulsion have been recognized as covered by the immunity of who gives the order, the judges. *Slotnick* v. *Garfinkle*, 632 F.2d 163, 166 (1st Cir., 1980) (per curiam) (Judges Coffin, Campbell and Bownes); *Green* v. *Maraio*, 722 F.2d 1013, 1019 (2nd Cir. 1983).

In *Forrester* v. *White*, 48 U.S. 219, 230 (1988) the Court reviewed judicial immunity and concluded that absolute immunity must be recognized when the danger of judges being deflected from the performance of their duties is very great. That is the precise situation in which the Justices of the Supreme Court of Puerto Rico will be placed if the opinions of the federal courts below are allowed to stand.

II. The decision of the Court of Appeals below is in conflict with the applicable decisions of the Supreme Court in matters concerning comity and abstention.

A. *The courts below erred when they substituted their own interpretation of the public interest embodied in the statutory and judicial establishment of an integrated bar in Puerto Rico; and in further demeaning the expressions of the Supreme Court of Puerto Rico as to the historical, sociological and juridical justification for its opinions concerning the type and nature of activities found germane to the duties and obligations of the Colegio de Abogados.*

The courts below in discarding the expressions of the Supreme Court of Puerto Rico as to the scope of the activities it finds germane to the Colegio functions disregarded basic principles of federalism. As Judge Campbell and Judge Breyer stated in their *en banc* opinion in *Piper* v. *Supreme Court of New Hampshire*, 725 F.2d 110 (1983) the Supreme Court of a state or its legislature may reasonably regard as harmful matter what may be of no concern to other states.

Chief Justice Rehnquist in his dissenting opinion in *S.Ct. of New Hampshire* v. *Piper*, 470 U.S. 274 at 292 characterizes this aspect of the legal practice as "distinctly and intentionally nonnational" with the "State having a substantial interest in creating its own set of laws responsive to its own local interests . . .". It was precisely to this end that the Supreme Court of Puerto Rico explained at length the need for the court to envision as it does the function of the Colegio. Those expressions by the Supreme Court of Puerto Rico should not be taken lightly if a true spirit of federalism is to survive.

B. *The Court of Appeals improperly requires the Colegio de Abogados to engage in a negotiation with the Supreme Court of Puerto Rico and to submit in six months to the District Court a new rule or some alternative, this procedure of monitoring state courts has been rejected by this Court as antipathetic to established principles of comity in the regulation of the legal profession.*

In *O'Shea* v. *Littleton*, 414 U.S. 488, 500-501 (1974) the Court revisited the object of comity that warrants withholding federal relief. Citing *Stefanelly* v. *Minard*, 342 U.S. 117, 120 (1951), the court reminded that "the object is to sustain the special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law". The Court of Appeals below has expressly allowed the

District Court to engage in the type of monitoring of state court functions that the Supreme Court has recognized to be "antipathetic to established principles of comity". *O'Shea*, *id.*, at 501.

The Supreme Court then, at 501-502, cautions against the complicated situation that arises from federally mandated continuing obligations of compliance. The scenario is similar to what may occur if multiple cases of non-compliance take place. The rationale in *O'Shea* and of those cases cited therein is applicable to the district court continuing *monitoring* of the Supreme Court of Puerto Rico remedy as disbarment proceedings may result if objecting attorneys refuse to obey the challenge remedy. Those disbarment proceedings are considered to be "quasi-criminal in nature". See *Keating* v. *Martin*, 638 F.2d 1121, 1123 (8th Cir., 1980), citing *In Re Ruffalo*, 390 U.S. 44 (1968).

The Court of Appeals below recognizes that the remedy that petitioners challenge is a creature of the Supreme Court of Puerto Rico and that "the Colegio is correct that the Justices are now appropriate parties in the dues claim because of their promulgation of the 1986 Rule". Actually the position of petitioner Colegio de Abogados was that the District Court (as well as the Court of Appeals) were ordering the Colegio de Abogados to change or modify a procedure that was *ordered* by the Supreme Court of Puerto Rico and that by said orders were creating a serious conflict between the obligations petitioner owes the Supreme Court of Puerto Rico and the declaratory and injunctive mandates of the federal courts.

The end result is a federal compulsion upon petitioners to modify or alter a procedure established through a judicial decision of the Supreme Court of Puerto Rico, that clearly amounts to an effort by the courts below to force the Puerto Rico court to move in the direction they find preferable. The Supreme Court of Puerto Rico expressly reserved jurisdiction to review and modify the remedy as needed by objectors who

should be going to the Supreme Court of Puerto Rico for redress. The federal effort is clearly a prohibited monitoring of that local judicial effort.

III. The decision of the Court of Appeals below is in conflict with the applicable decisions of the Supreme Court concerning the issuance of declaratory and injunctive relief.

A. *The existence of adequate legal remedies forbids the issuance of an injunction against the application of the remedy ordered by the Supreme Court of Puerto Rico to protect the rights of divident attorneys. Noncompliance with the requirement of joining indispensable parties to the injunction — such as the Justices of the Puerto Rico Supreme Court — deprives the federal forum of jurisdiction.*

Both courts below have designed an injunctive mandate addressed to the petitioner Colegio de Abogados and to the Secretaries. The injunctive relief granted to respondents was improperly allowed.

If the Supreme Court of Puerto Rico 1986 remedy was as argued by petitioner a judicial remedy and not an administrative rule as decided by the courts below then there is no doubt in anyone's mind that the court below lacked jurisdiction and any judgment, injunctive or otherwise, was improvidently issued.

But assuming *arguendo*, that the 1986 remedy was an administrative rule the courts below had no legal authority to issue an injunction against petitioner or against the secretaries.

One main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no adequate remedy at law. Wright and Miller, *Federal Practice and Procedure: Civil* § 2942 (1973 ed. pp. 368-369). See *Porto Rico Tel Co.* v. *Porto Rico Commun. Authority*, 189 F.2d 39, 41-42 (1st Cir. 1951) *cited by Trieb-*

wasser & Katz v. *American Tel. & Tel. Co.*, 535 F.2d 1356, 1359 (2d Cir., 1976).

The Supreme Court in *O'Shea* v. *Littleton*, supra, 414 U.S. at 502, clearly rules that a basic requisite of the issuance of equitable relief requires that a plaintiff, such as respondents, must establish the inadequacy of remedies at law. Both courts below failed to recognize this basic principle and in the absence of any allegation or proof by respondents as to inadequacy of remedies improperly issued injunctive orders against petitioners.

The adequacy of the remedies available to the respondents was admitted by Respondent Schneider to the District Court:

> We—our position is that the—regardless of the outcome of the appeal, that we have obtained a substantial improvement in the— in our— based on our position and our case by the fact— by the very fact that the Supreme Court did decide that the remedy that originally had been set up was inadequate and came up with a different remedy providing different terms even if those are not acceptable, that we have achieved substantially what we were after, regardless of what the outcome of the appeal may be. So that.....[A-K]

The respondents have ample and adequate remedies at law. They could return to the Supreme Court and request modification of the 1986 remedy, they could request any revision of the 1986 remedy they might feel necessary after *Keller* v. *State Bar of California* by filing motions on *Bar Association of Puerto Rico* v. *Robert E. Schneider, et al.*, No. 0-77-431 in which the Supreme Court has retained jurisdiction to motion the application and effectiveness of the 1986 remedy; respondents may file individual *ex parte* actions before the Supreme Court of Puerto Rico to request any relief they may feel necessary in order to protect any right they understand to be violated by their compelled membership in the Colegio de

Abogados or by the compliance by the Colegio of the mandates in the 1986 remedy.

The respondents or any other attorney may file in the Commonwealth courts actions for declaratory judgment concerning any portion of the enabling statute 4 L.P.R.A. 771, *et seq.*, and from there request review or appeal to the Supreme Court of Puerto Rico. In any event respondent could after the 1986 remedy seek review from this Court.

Keller shows that said recourse is not a farfetched alternative, especially since *Keller* does not turn on a specific remedy ordered by the Supreme Court a state for a bar association. 110 S.Ct. at 2237-2238. See also *Gibson* v. *The Florida Bar*, 906 F.2d 624, 631 end of note 12 (11th Cir. 1990). In *Lathrop* v. *Donohue*, 367 U.S. 820 at 824, Justice Brennan indicated concerning the integrated rule of the Wisconsin Supreme Court:

> We think that the order is a "statute" for the purposes of § 1257(2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question.

The finding in *Lathrop* is consonant with the long standing doctrine of avoiding any kind of monitoring of state court functions by federal courts, which the Supreme Court in *O'Shea* v. *Littleton*, 414 U.S. 488, 501 (1974), characterized as "antipathetic to established principles of comity."

B. *The courts below further erred when they based their declaratory and injunctive relief on stale evidence of events long passed.*

The District Court bases its 1988 opinion on the findings of fact presented in its 1983 opinion, *Schneider*, 682 F.Supp. at

678-679. See also 1983 opinion in *Schneider*, 565 F.Supp. at 966-971.

Prior to the hearing before the district court that resulted in the 1983 opinion, later vacated, the Colegio had presented all relevant information as to the totality of its activities and were the documents from which the district court selected the ones it found objectionable. All official publications were delivered to the Court. (Docket #114).

Records of activities either sponsored "by Colegio or held at the Colegio" were filed together with the data as to whether payment had been or had not been received; this information was provided for the previous 5 years. (Docket #128). The Colegio in addition filed substantial and numerous evidence at the 1983 hearing.

Furthermore on March 2, 1987, prior to the District Court's last hearing, that court entered an order (Docket #218) indicating that the Colegio "shall produce at the hearing all books, records, and documents necessary to *bring up to date* the information previously required by the Court." (Our emphasis).

At the pre-trial the respondents indicated that they "may announce new documentary evidence on the date of the hearing this decision will be made once the documents ordered produced by Judge TR [Torruella] are reviewed." (Docket #223).

The Colegio fully complied with the aforementioned Court Order. At the last hearing, July 8, 1987, the Colegio brought all the documents, book and records required by the March 2, 1987 order. But the Colegio went further. It produced the Supreme Court of Puerto Rico records that contained all the evidence presented both by the Colegio and by the plaintiffs. This evidence was voluminous and up to date as of July 1, 1987. Plaintiffs did not care to look at the documents and the District Court indicated:

> In view of the stipulation that has been entered into by the parties I don't know that it's necessary that I admit

> into evidence any of those documents that you brought today. After I issued the order I read the file and I thought that maybe I shouldn't have issued the order.

The court went further and indicated as follows:

> The only reason I issued my order was to give you the opportunity to bring up to date the findings of the prior opinion. Now, there is no reason to clog up the records with a whole bunch of papers in view of that stipulation. I am telling you that I am not going to then require the submission of these documents because it's unnecessary in view of the stipulation.

The Supreme Court of Puerto Rico record brought by the Colegio to the district court contained the documents listed by that court in its Appendix to the 1986 opinion, which appendix was moved into evidence by the Colegio at the July 8, 1987 hearing. So the nature of the information to which the Court of Appeals refers in footnote 8 was before the District Court and before the Court of Appeals. But the record was returned by the District Court to the Supreme Court. Any possibility of petitioners updating to 1987 the 1983 findings of facts made by the district court was then forgone by them and by the court.

The stipulation the district court so much refers to is the one quoted by the Court of Appeals in footnote 9, about which the panel indicates, *in fine*, "we note, however, that the Colegio stipulation acknowledges only that certain types of activities have continued and not that those activities constituted a substantial portion of all Colegio pursuits." It is important to note that the portion in brackets that appear in the quotation from the district court opinion was an editorial addition made by the district judge and not part of the stipulation that simply stated: *The plaintiffs and the Colegio stipulate that activities similar in nature to those undertaken by Colegio prior to 1983 have continued.* It is impossible to believe that such general statement, devoid of any factual specificity could relieve the

plaintiffs — now respondents — from their duty to present evidence in support of their allegations. As a matter of fact petitioner's position was then that the only pending issue was one of *law:* the adequacy of the 1986 remedy.

The gist of the matter is that the decision to issue the injunction was made on stale evidence, not on recent events. Courts have consistently held that this may not be done.

The granting of declaratory judgment and injunction for prior conduct as expressly done by the courts below was expressly rejected by the Supreme Court in *Green* v. *Monsour*, 474 U.S. 64, 64 (1985), where Chief Justice Rehnquist found mistaken the contention that "declaratory judgments expressly adjudicating the question of past violations are routinely available [in federal court]." See also *Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983). The injunctions granted by the Court below were illegally issued and must be reversed.

CONCLUSION

The issues presented in this case are of great importance to the judicial administration of compulsory bar membership across the nation, and therefore merit review by this Court. The litigation of compulsory bar membership under the United States Constitution must be developed into a cooperative effort, couched in basic principles of comity, between the states and the federal courts to allow state courts to devise and supervise the implementation of reforms that transcend minimum constitutional standards.

In this area of regulating the practice of law the crucial and most important task faced by the state courts today is, therefore, safeguarding the constitutionally protected rights of attorneys without confronting federal court monitoring so antipathetic to established principles of comity. The number of states and federal courts involved and the impact on the whole spectrum of public policy issues likewise require that

this Court clarify the standards that govern the judicial discretion that must be recognized to the supreme courts of the States to regulate and supervise the implementation of systems adopted by them to protect dissenters' rights.

The final First Circuit's Opinion (Appendix A) is in conflict with the *Rooker-Feldman* doctrine, supra. The situation requires the intervention of this Court to clarify the issues resulting from the adoption of a dissident protection system by the state courts *vis a vis* the standards to be applied when such system is devised by the bar association itself. By resolving and clarifying these issues the Supreme Court will deflect any conflict between the federal and state courts, as bar association and individual attorneys will not be faced with the grave decision of which court to obey. For these reasons, it is respectfully requested that a writ of certiorari be issued.

Respectfully Submitted,

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No. 90-

In the Supreme Court of the United States

OCTOBER TERM, 1990

COLEGIO DE ABOGADOS DE PUERTO RICO,
PETITIONER,

v.

ROBERT E. SCHNEIDER; HECTOR RAMOS; ORESTE V. RAMOS; JORGE F. ROMANY; AND JORGE SOUSS,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 88-1937 to 88-1939

Robert E. SCHNEIDER, Jr., et al.,
PLAINTIFFS, APPELLEES,

v.

COLEGIO de ABOGADOS de PUERTO RICO,
DEFENDANT, APPELLANT.

ROBERT E. SCHNEIDER, JR., ET AL.,
PLAINTIFFS, APPELLEES,

v.

COLEGIO de ABOGADOS de PUERTO RICO, et al.,
DEFENDANTS, APPELLEES.

Appeal of Carmen Ana CULPEPER, etc., et al.,
DEFENDANTS.

Robert E. SCHNEIDER, Jr., et al.,
PLAINTIFFS, APPELLANTS,

v.

COLEGIO de ABOGADOS de PUERTO RICO, et al.,
DEFENDANTS, APPELLEES.

HEARD NOV. 2, 1989.
DECIDED OCT. 24, 1990.

Robert E. Schneider, Jr., with whom Hector L. Marquez was on brief, for Robert E. Schneider, Jr., et al.

Anabelle Rodriguez-Rodriguez, Asst. Sol. Gen., with whom Rafael Ortiz-Carrion, Sol. Gen., Jorge E. Perez Diaz, Sol.

Gen., and Norma Cotti-Cruz, Deputy Sol. Gen., were on brief for Carmen Ana Culpeper, etc., et al.

Harry Anduze Montano with whom Carlos V. Garcia Gutierrez, Carlos A. Rodriguez Vidal, Pia Gallegos, Patricio Martinez, and Carlos Ramos, were on brief, for Colegio de Abogados de Puerto Rico.

Before CAMPBELL, Circuit Judge, COFFIN, Senior Circuit Judge, and PIERAS,* District Judge.

COFFIN, Senior Circuit Judge.

This case requires us to add another chapter, still not the final one, to an already lengthy saga concerning the constitutionality of Puerto Rico's system of mandatory bar membership. In the decision on appeal, the United States District Court for the District of Puerto Rico held that compelled membership in the bar association known as the Colegio de Abogados de Puerto Rico ("Colegio") is unconstitutional in its present form. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 682 F.Supp. 674 (D.P.R. 1988). The district court also invalidated statutes requiring that lawyers affix official stamps, sold by the Colegio, to all court documents. We agree that the present system is constitutionally deficient, and therefore in large part affirm the conclusions of the district court. We modify the court's judgment, however, to delay temporarily an injunction prohibiting mandatory dues so that the Colegio may remain integrated while it attempts to correct its constitutional defects.[1] We also limit the court's holding on the stamp statutes.

I. *Legal and Factual Background*

We detailed the origins and early history of this case at length when the dispute last came before us. *See Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir.

*Of the District of Puerto Rico, sitting by designation.

[1] An "integrated" bar is an association of attorneys in which membership and dues are required as a condition of practicing law in the jurisdiction.

1984). The district court in its most recent decision also set forth a thorough review of the prior proceedings. *See Colegio*, 682 F.Supp. at 675-679. We see no need to repeat, once again, the full factual and procedural background of this case. This opinion therefore shall contain only that history necessary for a full understanding of the issues we decide today.

Accordingly, we begin this background section by stating briefly the constitutional claim raised by plaintiffs and reviewing the federal law relevant to that claim. The next subsection describes the Colegio system as it presently exists. We then review the district court's decision. In Section II of the opinion, we briefly discuss jurisdiction and appealability issues. Section III contains our analysis and conclusions. The remaining sections discuss the stamp issue and damages, and provide a brief summary of the opinion.

A. Constitutional Principles

Plaintiffs, five attorneys, claim that Puerto Rico's mandatory system of bar membership violates their First Amendment freedom of association by depriving them of the right *not* to associate with the Colegio, which conducts activities they find objectionable.[2] Their primary complaint is that the Colegio uses their compulsory dues and fees to publicly espouse views and support causes, with which they disagree, on controversial issues far removed from the immediate concerns of lawyers. These issues have in the past included supporting the Sandinista Front for National Liberation in Nicaragua, forcing the United States Navy to leave the island of Vieques, stopping the

[2] Plaintiffs brought this action against the Colegio and the Commonwealth Secretaries of the Treasury and of Justice, and the Justices of the Puerto Rico Supreme Court, based on the alleged unconstitutionality of statutes compelling bar membership and payment of dues and stamp fees. *See* P.R.Laws Ann. tit. 4, §§ 771-785, 1006, 1038. The Justices remain in the case as nominal parties only in respect to the stamp claims. *See In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 20-27 (1st Cir. 1982). Thus, the defendants appealing at this time are only the Colegio and the Secretaries.

draft, and amending the electoral law in Puerto Rico. *See Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F.Supp. 963, 966-971 (D.P.R. 1983); 682 F.Supp. at 679-681.

In a decision reached after oral argument in this case, and for which we held up our opinion, the United States Supreme Court addressed a virtually identical claim made by 21 members of the California bar. In *Keller* v. *State Bar of California*, ___ U.S. ___, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), the Court reaffirmed its earlier conclusion that compelled membership in a state bar association, and the exaction of compulsory dues, do not per se violate an individual's First Amendment rights, *see Lathrop* v. *Donahue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961).[3] The court went on, however, to establish for the first time that the principles it previously had developed for the permissible use of compulsory union dues are equally applicable for the use of mandatory bar dues.

> *Abood* [v. *Detroit Board of Education*, 431 U.S. 209 [97 S.Ct. 1782, 52 L.Ed.2d 261] (1977)] held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

---

[3] Like the California and Michigan bar associations at issue in *Keller* and *Lathrop*, the Colegio is an organization established by statute to regulate the legal profession and perform other functions associated with improving the administration of justice. *See* P.R.Laws Ann., tit. 4, §§ 771-773. We therefore start from the proposition that the Commonwealth constitutionally may condition the right to practice law upon membership in the Colegio. *See Keller*, 110 S.Ct. at 2232-33 (quoting *Lathrop*).

110 S.Ct. at 2236.

The Supreme Court recognized that its limitation on the use of mandatory bar dues was not self-executing and that a difficult problem remained in defining the class of activities germane to "regulating the legal profession and improving the quality of legal services." *Id.* The Court again found the union context helpful in setting guiding principles, and quoted from its decision in *Ellis* v. *Railway Clerks*, 466 U.S. 435, 448, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984):

> "[W]hen employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."
>
> We think these principles are useful guidelines for determining permissible expenditures in the present context as well. Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.' *Lathrop*, 367 U.S., at 843 [81 S.Ct. at 1838] (plurality opinion).

110 S.Ct. at 2236. Even with this standard, however, the Court acknowledged that the line will be difficult to draw

> between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals. . . . But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.

Id. at 2237.

The Court in *Keller* also acknowledged that state bar associations may encounter added inconvenience or burden in ensuring that compulsory dues are used only for permissible purposes, but observed that "'such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate,'" 110 S.Ct. at 2237 (quoting *Keller* v. *State Bar*, 47 Cal.3d 1152, 1192, 255 Cal.Rptr. 542, 568, 767 P.2d 1020, 1046 (1989) (Kaufman, J., concurring and dissenting)).

The Court therefore held that a permissible system of mandatory bar membership must include a mechanism for protecting the rights of dissenting members to withhold financial support of activities that fall outside the bar's core purposes.[4] On the limited record before it, the Court declined to speculate on the various methods a bar association might adopt to accomplish the required segregation of funds. The justices noted, however, that the procedure they deemed adequate for unions in *Teachers* v. *Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.

[4] We shall use the phrases "core purposes" or "core functions" throughout this opinion to refer to the bar's responsibility for regulating the legal profession and improving the quality of the legal service available to the people of the Commonwealth.

Ed.2d 232 (1986), also would suffice in the bar setting. 110 S.Ct. at 2237. In *Hudson*, the Court held that "the constitutional requirements for the collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310, 106 S.Ct. at 1078.

Before turning to our analysis of whether the Colegio system, which is modeled after the *Hudson* procedure, fulfills these constitutional requirements, we complete our background summary by describing that system and why the district court found that it is inadequate to protect its members' First Amendment rights.

B. The Colegio System[5]

In 1982, in the course of state proceedings involving some of the attorneys who are plaintiffs in this federal case, the Supreme Court of Puerto Rico upheld under state law compulsory membership in the Colegio and compulsory financial support of the bar. *See Colegio de Abogados* v. *Schneider*, 112 D.P.R. 540, 12 Official Translations of the Opinions of the Supreme Court of Puerto Rico 676 (1982). Consistent with federal law, however, the court held that lawyers who dissented from ideological activities not related to the Colegio's purposes must have the right to prevent the use of their funds for those activities. The court ordered that a remedy be designed to protect the dissenters' right to object and, in a 1986 ruling, it adopted the rebate and escrow procedure that is challenged in this case ("the 1986 Rule"). *Schneider* v. *Colegio de Abogados*, 117 D.P.R. 504 (1986), Official Translation of the Supreme Court of Puerto Rico, slip op. (June 26, 1986) (hereinafter *Schneider*, Official Translation).

[5] In this section, and throughout Section I, we will focus entirely on the collection of mandatory dues. We will discuss the stamp issue separately below. *See* Section IV *infra*.

The elements of the Supreme Court procedure are as follows:

1. An interest-bearing escrow account must be set up, into which 15 percent of dissenting attorneys' dues will be deposited.

2. Dissenting attorneys may, at the time they pay their dues, file a general objection to the use of their dues for ideological activities unrelated to the core purposes of the Colegio, and eventually receive a refund of the proportion of their dues based on the cost of all activities found to be "objectionable," or

3. Attorneys may object on a case-by-case basis throughout the year, receiving a proportionate refund based on the cost of the specific activities to which they objected.

4. A three-member panel, composed of retired members of the Puerto Rico judiciary, will determine which activities are truly "objectionable" and whether the 15 percent escrow figure should be modified at some later date. This Review Board has promulgated regulations governing the objection procedure. *See* App. II at 323-344.

5. Dissenting members may not object to the use of their funds for activities related to any of 15 listed "functions and purposes" of the Colegio. *Schneider*, Official Translation, slip op. at 17-18.

C. The District Court Opinion

1. *Defects.* The district court found two significant defects in the Supreme Court's remedy. First, it held that the 1986 Rule fails to limit adequately the types of activities that may be funded with compulsory fees. Second, the method used to accommodate dissenting members, including the 15% escrow, falls short of the procedures required by the Supreme Court for protecting dissenters' rights. We now describe its findings with regard to each of these in some detail.

a. *Activities Suitable for Compulsory Funding.* The 1986 Rule provides for mandatory support for all "[a]ctivities com-

prised within the Bar Association's purposes and ends which are germane thereto." *Schneider*, Official Translation, slip op. at 17. In other words, if an activity promotes a purpose of the Colegio, dissenters may be compelled to subsidize it. The problem, in the district court's view, is that the Puerto Rico Supreme Court has defined too broadly the "purposes and ends" that justify mandatory financial support. The court in particular rejected two purposes articulated by the Puerto Rico court in support of the integrated bar: "'the creation of a strongly pluralistic society,'" *Schneider*, Official Translation, slip op. at 13 (quoting *Schneider*, 112 D.P.R. at 549) and "contribut[ing] to the betterment of the administration of justice," *id.* at 18.

The district court's concern was that almost *any* activity could be said to advance one or both of these interests, and that dissenting lawyers therefore would be compelled to accept the Colegio's publicly expressed viewpoint as representing them on a vast number of sensitive issues. "Accepting these standards as the guides to determine permissible bar activity," the court stated, "would be tantamount to a complete abdication of the court's duty to protect dissenting attorneys' First Amendment rights." 682 F.Supp. at 683.

The district court therefore articulated its own list of "permissible purposes" for which financial support may be compelled. These purposes, which the court acknowledged may not be exhaustive, all revolve around the role of the lawyer as lawyer, rather than relying on the lawyer's more generic role as an informed and perhaps influential member of a complex society. The four areas are: monitoring attorney discipline, ensuring attorney competence, increasing the availability of legal services and improving court operations. Activities that promote one or more of these purposes, and which therefore may be funded by mandatory dues and fees, could include continuing legal education programs, legal aid services, public education on substantive areas of the law (e.g., landlord-tenant) that would help citizens recognize and enforce their legal

rights, and public commentary on such matters as rules of evidence and attorney advertising.[6]

b. *Procedures.* The district court found procedural problems with the 15% escrow amount and with the manner of filing objections.

The escrow system is inadequate, the district court held, because the 1986 Rule fails to require a detailed accounting showing how the Colegio spends its funds, and how it calculated the 15% setaside. The court relied on *Hudson* in holding that the Colegio each year must precisely calculate the escrow percentage based on its projected budget and its estimate of expenditures to be made for objectionable purposes. 682 F.Supp. at 687-88. It held that the Colegio not only must explain the basis for the escrow amount, but also must justify the entire amount to be collected. The court further held that the Colegio must include a "buffer" in the escrow percentage to ensure that, if the impermissible expenditures exceed the amounts budgeted for them, the funds required to be returned to dissenting members do not exceed the escrowed amount.

The other procedural problem noted by the district court is the requirement that dissenters file objections to specific activities in order to receive a refund.[7] The court held that, under

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[6] In fact, the district court identified a fifth category of permissible expenditures — those without expressive content that benefit all members equally. 682 F.Supp. at 685. The Colegio, for example, provides life insurance for its members. Because these kinds of items do not infringe on members' First Amendment rights in any significant way, if at all, the court felt that they need not be strictly scrutinized. *Id.*, *citing El'is* v. *Railway Clerks*, 466 U.S. 435, 456, 104 S.Ct. 1883, 1896, 80 L.Ed.2d 428 (1984).

[7] Although the remedy provides for a "general objection" to be filed at the beginning of the dues year, or at any time thereafter, the district court viewed the filing of a general objection merely as a "notice of the right to object," with no refund being made until the Review Board adjudicates specific objections. *See Schneider*, Official Translation, slip op. at 22 (§ C(3)(e)) and Regulations at Articles 11 and 13, App. II at 337, 340.

At oral argument, defendants claimed that once any type of objection is made — general or specific — the independent review panel must review all Colegio activities and expenditures in order to determine which were objectionable. Those making general objections would receive a full refund for all

Abood, a dissenter may not be required to object specifically to an activity because this "'would confront an individual . . . with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.'" 682 F.Supp. at 689 (quoting *Abood*, 431 U.S. at 241, 97 S.Ct. at 1802).

2. *State of the Record.* The district court unquestionably was bothered by the state of the record before it. Despite repeated invitations, defendants failed to present evidence concerning the extent of the Colegio's non-ideological activities. Instead, they urged the court to take judicial notice of the lengthy list of law-related activities conducted by the Colegio that was contained in the 1986 opinion of the Supreme Court of Puerto Rico. *See Schneider*, 682 F.Supp. at 692-94 (Appendix A). *See also Schneider*, Official Translation, slip op. at 25-43 (Appendix listing activities).[8] That court had found that the Colegio's ideological activities were de minimis. *Id.* at 13.

In contrast to the lack of evidence regarding non-ideological activities, the district court received substantial evidence of the partisan political activities undertaken by the Colegio. *See* 682 F.Supp. at 679-681. No party, however, provided the court with quantitative or comparative data showing what percentage of Colegio activities typically are devoted to each category. Accordingly, the court felt obliged to conclude "that the ideological activities of the Colegio constitute a large and

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objectionable activities, whether or not there had been a specific objection.

We note, however, that neither the 1986 Rule nor the regulations adopted to implement it include a provision for refunds in the absence of specific objections. Thus, on their face, the Rule and regulations seem to operate as the district court described.

[8] At oral argument, the attorney for defendant Colegio stated that numerous documents, many of which had been generated for the state court proceeding that led to creation of the 1986 Rule, had been offered to the district court but were never admitted into evidence. We obviously do not know the nature of the information contained in those materials, and we have no basis for questioning the district court's apparent conclusion that the offered documents would not have resolved its questions concerning the Rule.

inseparable proportion of the Colegio's total activities." 682 F.Supp. at 681.[9]

Despite the problems it found, the district court stated its belief that the Colegio could devise a lawful procedure incorporating most of the features of the 1986 Rule. 682 F.Supp. at 691. In the absence of appropriate modifications, however, the court held that the Colegio either must cease *all* ideological activities not germane to its core purposes or it may not compel membership. So long as the status quo remained, defendants were enjoined from taking any action against any lawyer for failing to pay fees to the Colegio.

II. *Jurisdiction and Appealability*

Before delving into our own discussion of the Colegio mandatory membership system, we briefly address the parties' various contentions that the case is not properly before us. The defendants claim that principles of federalism, res judicata and collateral estoppel bar our review. Plaintiffs argue that defendants failed to perfect their appeals because of untimely and incorrect filings. We reject all of these claims.

[1] *Jurisdiction and preclusion.* It is well-established that lower federal courts have no jurisdiction to hear appeals from state court decisions, even if the state judgment is challenged as unconstitutional. Review of state decisions may be obtained only in the United States Supreme Court. *See D.C. Court of*

[9] The district court observed that the apparent factual inconsistency between its findings of "pervasive and continuous" ideological activities by the Colegio, 682 F.Supp. at 678; 565 F.Supp. as 965, and the Commonwealth court's finding that such activities were de minimis was attributable, "at least in part, to a different conception of what are ideological activities." 682 F.Supp. at 678 n.3.

The court also suggested that the Commonwealth Supreme Court's findings were inconsistent with the Colegio's stipulation "that activities similar in nature to those undertaken by the Colegio prior to 1983 [and listed by the district court in its 1983 opinion, 565 F.Supp. at 966-71] have continued." 682 F.Supp. at 678 & n.3. We note, however, that the Colegio's stipulation acknowledged only that certain types of activities have continued, and not that those activities constituted a substantial portion of all Colegio pursuits.

Appeals v. *Feldman*, 460 U.S. 462, 476, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). *See also* 28 U.S.C. § 1257. In *Feldman*, the Supreme Court considered the so-called *Rooker* doctrine specifically in the context of attorney challenges to rules and regulations governing the bar, in that instance relating to bar admission. The Court carefully distinguished between "general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings" — for which there *is* jurisdiction in the lower federal courts — and "challenges to state-court decisions in particular cases arising out of judicial proceedings," 460 U.S. at 486, 103 S.Ct. at 1317 — for which there is not.

Defendants claim that the *Rooker* doctrine is triggered in this case because plaintiffs are, in effect, attempting to appeal the Puerto Rico Supreme Court's decisions in the *Schneider* case. According to defendants, the 1986 Rule was the particular judicial remedy ordered in the original Commonwealth *Schneider* case, and the district court therefore had no jurisdiction to consider its validity.

We disagree, primarily for the reasons identified by the district court. 670 F.Supp. 1098, 1100-1103. The fate of attorneys Schneider and Ramos — the particular judicial decision made in the Commonwealth court — is not at issue here. Plaintiffs challenge not the outcome of that specific case, but the general Colegio system of mandatory bar membership, as defined by various statutory provisions and the 1986 Rule. Although the motivation for the 1986 Rule originated with the Schneider-Ramos case, we are persuaded that the Supreme Court invoked its inherent powers over the bar to go beyond their individual complaints to accomplish needed bar reform. *See Romany*, 742 F.2d at 34 n.3, 40 & 42 (Puerto Rico Supreme Court has "unique latitude" to regulate the bar). That the court chose to combine its rule-making with its adjudication in the form of a single opinion does not detract from the nonjudicial nature of the Rule. *See Feldman*, 460 U.S. at 482, 103

S.Ct. at 1314 ("'[T]he form of the proceeding is not significant. It is the nature and effect which is controlling.'") (quoting *In re Summers*, 325 U.S. 561, 567, 65 S.Ct. 1307, 1311, 89 L.Ed. 1795 (1945)). *See also Zimmerman* v. *Grievance Com. of Fifth Jud. Dist.*, 726 F.2d 85, 86 (2d Cir. 1984) (referring to the possibility of a combined adjudication and rulemaking in single opinion); *Razatos* v. *Colorado Supreme Court*, 746 F.2d 1429, 1433 (10th Cir. 1984) (finding jurisdiction after noting that "[t]he distinction is often difficult to draw" between "general challenges to state bar rules as promulgated and challenges to state court decisions in particular cases.")

Moreover, a contrary conclusion on the nature of the 1986 Rule would have little impact on this litigation because only two of the plaintiffs were parties in the state court; thus, even if jurisdiction were improper as to them, the case would continue on behalf of the remaining plaintiffs. *See In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 26 (1st Cir. 1982).[10]

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[10] Defendant Colegio claims that, if the 1986 Rule was the product of a regulatory rather than an adjudicative process, then plaintiffs should have amended their complaint to seek review of an administrative act and the district court should have reviewed the rule under the substantial evidence test that is used for agency decisionmaking. This argument is without merit. The district court had no jurisdiction to conduct an administrative review of the 1986 Rule. It considered the Rule's content as part of plaintiff's claim that the Colegio mandatory membership system violates the First Amendment. The question before the district court was not whether there was substantial evidence to support the Rule, but whether the Rule modifies the compulsory Colegio system specified by statute so that that system meets constitutional requirements.

The Colegio also argues that the Supreme Court Justices should have been brought in as parties if the validity of a "rule" were at stake. Although the Justices originally were full defendants and remained as nominal parties with respect to the stamp claims, we ordered dismissal of the claims against the Justices in 1982 "insofar as they involve Puerto Rico's system of compulsory bar membership and compulsory payment of bar dues." *See In re Justices*, 695 F.2d at 20-25, 27. At that time, the compulsory membership and dues claims involved only the statutes creating and regulating the Colegio. The Colegio is correct that the Justices are now appropriate parties in the dues

[2] As for defendants' invocation of res judicata and collateral estoppel as bars to this action, we note that the district court first rejected these claims in 1982, and that that decision was not challenged in the subsequent appeal to this court. *See Romany*, 742 F.2d at 37 n.6. Nothing that has occurred either in the Puerto Rico Supreme Court or the district court since that time convinces us that we should now open up that issue for full review. Moreover, unlike jurisdiction, preclusion is a matter subject to some flexibility in application. *See Berrios Rivers v. British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978) (Puerto Rico courts have recognized that "in certain cases, the policies of *res judicata* are not well served by literal application of the procedural rules of the courts.") Accordingly, without further analysis, we choose to treat the district court's 1982 ruling on preclusion as establishing the law of the case. *See* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 801 (1981) (if a "matter is omitted from one appeal . . . it may be held foreclosed on a later appeal to the same court as a matter of law of the case").[11]

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claim because of their promulgation of the 1986 Rule. *Id.* at 23. We fail to see, however, how this fact affects the validity of either the district court's judgment or our own. The Colegio and Secretaries have defended the 1986 Rule on the merits, and the Colegio presumably has the ability to ensure that the Rule is refined in the ways required by our opinions. If not, plaintiffs' rights will be effectively protected by the district court's injunction against the Colegio and the Secretaries.

[11] As with the *Rooker* doctrine, res judicata and collateral estoppel would not, in any event, apply to plaintiffs Romany, Souss and Oreste Ramos Diaz because they were not parties on the merits in the Commonwealth litigation. Although defendants attempt to characterize them as having *withdrawn* from the Commonwealth case, and the Supreme Court in its 1986 ruling refers to a motion on their behalf "to be relieved from further participation in the case," *Schneider*, Official Translation, slip op. at 5, we fail to see how they were parties in the first place.

In addition, the rulemaking aspects of the Puerto Rico case, including the Supreme Court's factfinding on the nature and extent of the Colegio's "objectionable" activities, do not implicate preclusion principles because they were not "judicial proceedings" entitled to full faith and credit. *See* 28 U.S.C. § 1738.

Thus, the potential scope of preclusion in this case is quite narrow, and even had defendants preserved and prevailed with this defense against plain-

[3] *Appealability.* Plaintiffs contend that both the Colegio and the Secretaries filed untimely appeals from the wrong judgments. Appeals must be filed "within 30 days of the judgment or order appealed from," Fed.R.App.P. 4(a)(1), and courts of appeals have jurisdiction only over "[f]inal decisions," 28 U.S.C. § 1291. Before addressing the merits of plaintiffs' argument, we review the procedural chronology.

The district court issued a full opinion on the merits on March 3, 1988, but delayed entering final judgment until after the defendants had an opportunity to modify the remedy to bring it into compliance with the court's guidelines. The defendants made no changes, and the court issued an opinion on May 27 entering judgment in accordance with the March 3 decision. That May 27 decision was formally entered on the docket on either May 31 or June 1. On June 13, the Colegio filed a motion requesting additional findings of fact, which was denied by the district court on July 15. Both the Colegio and Secretaries filed their appeals on August 10.

The Colegio appealed from the court's March 3 order and from the July 15 denial of its motion for additional findings of fact. The Secretaries' notice of appeal sought review of a June 17 judgment.

It is worth noting at the outset of our discussion that if form alone were to govern, we would have to dismiss both appeals of the merits. The Secretaries appealed from a nonexistent judgment on June 17, while the Colegio appealed from a nonfinal judgment — the one on March 3. It would disserve the interests of justice, however, if we dismissed the appeals on these grounds. Indeed, the Secretaries apparently made no more than a clerical mistake in referring to a June 17 judgment, which should not bar appellate review. *See Foman* v. *Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 229, 9 L.Ed.2d 222 (1962). The Colegio, while committing more than clerical error, undoubtedly appealed from the March 3 decision be-

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tiffs Schneider and Ramos, our opinion would have differed only with respect to their individual entitlements to damages.

cause it contained the district court's full analysis. With regard to both appellants, there is no doubt as to the nature of their appeals, and avoiding decision on the merits would be contrary to the spirit of the Federal Rules of Civil Procedure. *Id.*

As for timing, we accept the district court's conclusion that the Colegio's motion for additional findings of fact was timely,[12] extending the time for filing an appeal of the court's judgment until 30 days following the court's decision on that motion. *See* Fed.R.App.P. 4(a)(4) (timely motion by *any* party extends time for appeal). Both the Colegio and the Secretaries met that extended deadline.

III. *Discussion*

We begin by stating that, in most significant respects, we agree with the district court's legal conclusions and its disposition of this case. We nevertheless write at some length so that we may respond to arguments made by both plaintiffs and defendants,[13] and so that, in some instances, we may elaborate on the district court's discussion in ways that we hope will prove helpful to defendants in administering a constitutional procedure for protecting dissenters' rights.

Our review of the Colegio system requires us to answer three primary questions: what activities may be funded with compulsory dues? does the 1986 Rule adequately protect the right of dissenters *not* to contribute to other activities? and

[12] Plaintiffs argue at length about whether the official entry of judgment for the May 27 decision occurred on May 31 or June 1. Regardless of the correct date, we would not reject as untimely an appeal that is dependent on the later date because of the legitimate confusion over which date the judgment was entered.

[13] Both plaintiffs and defendants filed appeals in this case. Defendants claim that the district court erred in concluding that the 1986 Rule fails to meet constitutional requirements. Plaintiffs claim that the court erred in finding that they do not have standing to challenge the government's involvement in collecting Colegio stamp fees, in awarding them only nominal damages and in approving certain aspects of the 1986 Rule.

what steps must defendants take to fulfill their constitutional obligations to dissenters?[14] We address each of them in turn.

A. What activities may be funded with compulsory dues?

The district court's view that an integrated bar may use compulsory dues only for activities directly related to the lawyering profession and the operation of the judicial system accords with the Supreme Court's subsequent pronouncements in *Keller*. *See supra* p. 624. To be sure, Puerto Rico's legislature and Supreme Court evidently envision purposes for the Colegio extending far beyond a "professional advisor" role. *See Keller*, 110 S.Ct. at 2235; *Schneider*, Official Translation, slip op. at 13. But even if it persuasively could be argued that lawyers in Puerto Rico play a distinctive role in creating a pluralistic society, and that collective political action by lawyers is therefore uniquely central to the mission of the Puerto Rico bar, compulsory funding of non-legal ideological activities would impose too great a burden on the First Amendment rights of individual members to be constitutionally acceptable. Lawyers who wish collectively to advocate certain political views can band together in a voluntary association, without coercing those with different views to join their ranks.

The Supreme Court cases upholding compelled membership rest on an implicit assumption that "'the cause which justified bringing the group together,'" *see Abood*, 431 U.S. at 223, 97 S.Ct. at 1793 (quoting *Machinists* v. *Street*, 367 U.S. 740, 778, 81 S.Ct. 1784, 1805, 6 L.Ed.2d 1141 (1961) (Douglas, J., concurring)), would be sufficiently narrow that dissenting em-

[14] Throughout the discussion section, our assumption is that defendants would choose to modify the 1986 Rule so that it meets constitutional requirements rather than to design a completely new procedure for protecting dissenters' rights. Defendants are, of course, free to tackle such a project if so inclined. *See Keller*, 110 S.Ct. at 2237-38 (leaving open the possibility that procedures different from those described in *Hudson* could satisfy an integrated bar's obligation to dissenters).

ployees would be forced to associate against their will in only a limited way. As the district court recognized, if objecting members could be required to subsidize any activity that promoted the creation of a strongly pluralistic society, the limitation on compulsory support carved out in *Abood* would be meaningless.

[4] Thus, the district court correctly set the boundaries for the Colegio's use of compulsory dues. The court also described various activities that fall within those boundaries, *see supra* p. 626, and we endorse its list.[15] The district court's discussion of activities, however, dwelled primarily on bar programs that we think fall at an extreme end of the spectrum, and for which there would be little dispute that compulsory financing would be appropriate. We therefore think it worth adding to its catalog both some general principles and some specific examples to assist in categorizing activities as either appropriate or inappropriate for compulsory funding.

Before we begin that list, however, it is necessary to review the United States Supreme Court's rather sketchy references to the propriety of using compulsory dues for "nongermane, nonideological expenditures," *Hudson*, 475 U.S. at 304 n.13, 106 S.Ct. at 1074 n.13. These would include, for example, the costs of members' life insurance or purely social activities. In *Hudson*, the most recent compulsory union dues case, the Court specifically refrained from deciding whether "the category of impermissible expenditures included all those that were not germane to collective bargaining, even if they might not be characterized as 'political or ideological,'" *id.* at 299, 304 n.13, 106 S.Ct. at 1072, 1074 n.13.[16]

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[15] We note that most of the activities listed as non-objectionable by the Puerto Rico Supreme Court, and restated in regulations issued by the Review Board, *see* App. II at 331-334, are within the court's acceptable range. These are described by the regulations as "[a]ctivities closest related to the practice of law and the administration of justice." *Id.* at 331.

[16] A majority of the Court of Appeals in *Hudson had* addressed that issue, and concluded that compulsory dues could not be used for such purposes." *See* 743 F.2d 1187, 1194 (7th Cir. 1984). The Supreme Court saw no need to reach the question, however, because the plaintiffs' challenge was to the

In an earlier case, however, the Court had considered whether expenditures for union social activities could be financed with compulsory dues. *See Ellis*, 466 U.S. at 449-50, 456, 104 S.Ct. at 1893, 1896. After concluding that the Railway Labor Act permitted the union to charge all employees for such expenses, the Court only briefly addressed the First Amendment question:

> Petitioners do not explicitly contend that union social activities implicate serious First Amendment interests. We need not determine whether contributing money to such affairs is an act triggering First Amendment protection. To the extent it is, the communicative content is not inherent in the act, but stems from the union's involvement in it. The objection is that these are *union* social hours. Therefore, the fact that the employee is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union. Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint.[17]

466 U.S. at 456, 104 S.Ct. at 1896 (emphasis in original).

Despite the Supreme Court's reluctance in *Hudson* to confront the "constitutional nongermaneness question," we think the quoted discussion from *Ellis* provides the appropriate analysis for resolving the issue. Moreover, not only is the First Amendment not a factor, but "[t]he very nature of the free-rider problem and the governmental interest in overcoming it

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procedure used to protect dissenters' rights and not to particular expenditures. The Court felt that the procedural requirements would be the same regardless of the outcome of the "constitutional nongermaneness question." 475 U.S. at 304 n.13, 106 S.Ct. at 1074 n.13.

[17] Although the plaintiffs in *Ellis* also challenged mandatory funding of the union's death benefits program, the Court found it unnecessary to reach that issue because the union was no longer the exclusive bargaining agent for the plaintiffs and so they no longer were involved in the death benefits system.

require that the union have a certain flexibility in its use of compelled funds." *Ellis*, 466 U.S. at 456, 104 S.Ct. at 1896. We therefore conclude, as did the district court, that activities incidental to the operation of an association — such as social events and the provision of insurance to members — may be financed with mandatory fees.

[5] 1. Political activities, including lobbying, may be funded from compulsory dues so long as the target issues are narrowly limited to regulating the legal profession or improving the quality of legal service available to the residents of Puerto Rico. *See Keller*, 110 S.Ct. at 2236-37. Thus, for example, the Colegio could lobby in favor of budget appropriations for new judicial positions or increased salaries for government attorneys, or against statutory limitations on attorney advertising or requirements for the certification of legal specialists. *Cf. Gibson* v. *The Florida Bar*, 798 F.2d 1564, 1569 & n.4 (11th Cir. 1986).

It would not be permissible, however, to use mandatory dues for such lobbying if the Colegio's position rested upon partisan political views rather than on lawyerly concerns. For example, while it would be appropriate for the Colegio generally to lobby regarding attorney advertising, it may not use mandatory dues to advocate restrictions only on advertising for legal services in aid of (or opposed to) family planning agencies or abortion clinics. It likewise would be impermissible for the Colegio to use mandatory dues to lobby on any issue pertaining to the political status of Puerto Rico, even if arguably related to the legal profession or the quality of legal services.

[6] 2. Among the activities that could *not* properly be funded with mandatory dues would be lobbying on controversial bills to change the law in ways not directly linked to the legal profession or the judicial system. For example, the bar could not use dissenting members' funds to promote a system of pro-life amendment to the Commonwealth constitution or generate support for a death penalty. *See Keller*, 110 S.Ct. at 2237.

We see no problem, however, in the Colegio's participation in efforts to amend technical, non-ideological aspects of substantive law. For example, the Wisconsin state bar's 1975 legislative program included advocacy on two bills that would appear to have engendered no controversy: one making it clear that land contracts enjoy the same exemption from the Wisconsin Consumer Act as do first lien mortgages, and the other simplifying condominium transactions by abolishing a requirement that floor plans be recorded. *See* T. Schneyer, "The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case," 1983 Am.B.Found.Res.J. 1, 31 (1983) (hereinafter "Unified Bar Concept"). Another example falling into this category would be a bill to allow notaries to use either a stamp or a seal on documents. All of these measures appear politically noncontroversial and designed merely to "'improv[e] the quality of the legal service available to the people of the [Commonwealth],'" *Keller*, 110 S.Ct. at 2236 (quoting *Lathrop*, 367 U.S. at 843, 81 S.Ct. at 1838).

[7] 3. Among the Colegio's activities that clearly fall outside the narrow categories for which financial support may be compelled are the following Colegio-sponsored committees: the Committee for the Study of the Constitutional Development of Puerto Rico from 1977 to 1984, which, among other business, has published a report on the "Procedural Requirements for Decolonization of the United Nations organization"[18];

[18] The Puerto Rico Supreme Court described the work of this committee as follows:

> The Committee for the Study of the Constitutional Development is constituted by attorneys from all political stands. Among the studies it has conducted, the most important are: police corruption as a threat to the democratic system, the electorate's direct means of intervention in the political process. And the third one is the result of a series of reports on the Puerto Rican status issue. One of the reports, which was unanimously approved by the members of the Committee, recommends some minimum requirements that should be guaranteed under any status alternative. Based on these reports, the President of the Bar Association has appeared before the United Nations to present the recommendations of the Committee.
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> *Schneider*, Official Translation, slip op. at 36 (citations omitted).

the Electoral Process Committee, which was created "to enhance the level of political debate in our country, to enforce compliance with the laws governing the voting process and to frame a code of ethics to regulate public debate among political candidates"; the Special Committee on Nuclear Armament and the Nuclear Arms Ban Treaty in Latin America, and the Committee for the Study of the Proposed Territorial Demarcation of the San Juan and Rio Piedras Delegations. *See Schneider*, Official Translation, slip op. at 48-49; 53; 54.

[8] 4. In many instances, it is likely that activities that may be subsidized with mandatory dues will be combined with those that may not. Consider, for example, a hypothetical annual meeting where business matters of direct concern to the regulation of the legal profession will be discussed, but where the chaplain opens with a long prayer for the health of Fidel Castro, and the featured speaker is a prominent Sandanista. Even if the business meeting takes two hours, and the prayer and speech together take only 35 minutes, we think it likely that the atmosphere would have become so partisan that the proportionate cost of the whole meeting should be deducted from a dissenter's dues. In other words, where the permissible and impermissible are intertwined beyond separation, the objector should be entitled to a full rebate for the cost of the function.

[9] The district court made a similar observation with respect to the Bar's publications, holding that "[e]ach publication stands or falls . . . as an indivisible entity, depending on its editorial policy." 682 F.Supp. at 686. If a magazine is devoted to educational articles about the legal profession or the quality of the legal services available in the Commonwealth, it may be funded by compulsory dues. A magazine that publishes markedly political and ideological material may not rely on that source of funding (unless, perhaps, the magazine publishes a broad spectrum of counterbalancing views).

This list, obviously, is not intended to be exhaustive, but it hopefully will provide some context within which to evaluate other activities.

B. Does the 1986 rule adequately protect the right of dissenters NOT to contribute to other activities?

It is not disputed that the Colegio regularly has engaged in activities that may not be funded with compulsory dues. Assuming that it continues to do so in the future, it must ensure that dissenters' dues are used only for activities germane to the bar's core functions or for other pursuits incidental to the operation of a bar association. The district court concluded that the procedures specified in the 1986 Rule are inadequate to accomplish that task. We agree.

Before turning to the specific procedural deficiencies of the Rule, however, we note our previous observation that there is an argument to be made that "the Colegio's penchant for ideological contention is so pervasive and unremitting . . . that Puerto Rico cannot constitutionally force dissenters to join," *Romany*, 742 F.2d at 40-41. Although the present record leaves that argument unresolved, we are not yet prepared to hold that a rebate and escrow system to protect dissenters is necessarily unworkable. The district court believed that such a system could work and it is clear that the Colegio does engage in some activities that serve the core purposes of a bar association identified by the Supreme Court in *Keller*. Thus, while leaving open the possibility that no such system would suffice, our comments on the Rule are based on the assumption that it could be modified to meet constitutional requirements. *But see* L. Tribe, *American Constitutional Law* § 12-4 at 805 n.5 (2d ed. 1988) (in the case of unions, it may be preferable to require ideological activities unrelated to collective bargaining to be financed from voluntary contributions).[19]

[10] Our view of the Rule's procedural problems coincides with that of the district court, and we therefore shall not revisit at length matters that that court already has covered well.

[19] We also leave open, as did the Supreme Court in *Keller*, *see* 110 S.Ct. at 2238, the alternate possibility that the Colegio should be enjoined permanently from using its name to advance political or ideological causes beyond those for which mandatory financing is permissible.

See Schneider, 682 F.Supp. at 687-89. We emphasize, however, the Rule's two biggest procedural shortcomings: the failure to justify and support adequately an escrow percentage limited to 15% and the need for objections to specific activities as a prerequisite for refunds.

With respect to the escrow percentage, neither the Rule nor the record as a whole offers support for the 15% figure or, indeed, for any specific allocation of the amount of resources devoted to activities either entitled or not entitled to mandatory financing. Fifteen percent would seem, on its face, to be a small proportion. It is the Colegio's obligation at the outset of a dues year to categorize its activities so that an escrow amount can be based on actual anticipated expenditures for non-core activities. Although "absolute precision" in predicting plans and expenses is not required, *see Hudson*, 475 U.S. at 307 n.18, 106 S.Ct. at 1076 n.18, it is insufficient to classify activities only after a member specifically objects to financing them with mandatory dues. This would place too great a burden on members to monitor Colegio activities. *See Abood*, 431 U.S. at 241, 97 S.Ct. at 1802.

[11] In addition, we reject the Colegio's challenge to the district court's imposition of a "buffer" allocation in the escrow amount, *see* 682 F.Supp. at 688-89. Because "absolute precision" in predicting the upcoming year's plans is unlikely, such a cushion will serve to avoid, or minimize, any First Amendment infringement resulting from a higher-than-budgeted expense for non-core ideological activities. Although the Colegio's right to use its funds freely will be compromised if the cushion turns out to be unnecessary, we think it appropriate to err on the side of protecting the First Amendment rights of the Colegio's compelled members. If, over time, it turns out that the Colegio accurately predicts the nature of its annual expenditures, it will be free to seek relief from the buffer requirement. At this time, however, we see no basis on which to second-guess the judgment that such a cushion is appropriate.

The fact that the Supreme Court has not explicitly required such an amount in the past does not render it invalid.[20]

[12] The district court also ably outlined the measures necessary to bring the Colegio into conformance with Supreme Court requirements concerning the method for objecting to expenditures. 682 F.Supp. at 689. As the district court recognized, a primary feature of a constitutional system is that dissenters be able to trigger refunds by means of general objections so that they need not make public their views on specific issues. *See id.* (quoting *Abood*, 431 U.S. at 241, 97 S.Ct. at 1802).[21] Dissenters also may not be required to explain the basis for particular objections beyond detailing why they view a disputed activity to be outside the Colegio's core functions. *See* Regulations § 12.1, App. II at 338 ("The objection shall be raised in a brief document briefly listing the reasons on which the objection is based.")[22]

[13] We, like the district court, decline to invalidate the use of former Justices of the Puerto Rico Supreme Court as members of the three-member Review Board that will deter-

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[20] Moreover, such a cushion is not unprecedented. The Chicago Teachers Union rounded up its estimate for expenditures unrelated to collective bargaining and contract administration in establishing a dissenters' rebate to provide a cushion to cover inadvertent errors. *See Hudson*, 475 U.S. at 295, 106 S.Ct. at 1070.

[21] As noted above, it may be that defendants intend that the procedure operate in this fashion, in other words, that a general objection lodged at the beginning of the dues year automatically will entitle that dissenter to a full rebate for the amount spent on all activities unconnected with the Colegio's core purposes. *See supra* n.7.

[22] Thus, one way for an objection procedure to work would be for the Colegio to provide members at the beginning of the dues year with a proposed budget that classifies activities as appropriate or inappropriate for mandatory financing. Based on that classification, the budget would include an escrow percentage for dissenters' dues. Members who filed a general objection at the beginning of the year would trigger an escrow contribution on their behalf and ultimately would be entitled to a rebate for all activities listed as inappropriate for mandatory financing. In addition, members must be able to challenge the placement of particular activities within the "non-objectionable" category. Moreover, the Colegio has the obligation to adjust the refund amount during the year based on actual expenditures.

mine which activities may be funded with compulsory dues. Plaintiffs challenge the impartiality of the Justices because of their participation in the Supreme Court's decision upholding the integrated bar and setting a wide scope for the bar's core functions. We agree fully with the district court's judgment that a panel whose members include former Supreme Court Justices "meets the requirements of an 'impartial decision-maker,' at least facially until appropriate evidence is presented to the contrary." 682 F.Supp. at 689.

C. What steps must defendants take to fulfill their constitutional obligations to dissenters?

[14] As a result of the deficiencies it found with the Colegio's present method of operation, the district court enjoined the Puerto Rico bar association from compelling membership until it either ceased *all* ideological activities not germane to its core purposes or devised an adequate system to protect dissenters' rights. We find no abuse of discretion in the court's decision to impose this injunction, but for various reasons believe that its implementation should be delayed for six months while defendants work to modify their Rule. If, at the end of six months, defendants have failed to submit to the district court a rule that resolves the constitutional problems identified in its opinion and our own, and if no extension of time has been granted for cause by the district court, the injunction will take effect. During this interim period, 100% of dissenters' dues should be held in escrow, to be refunded in full if no adequate procedure is developed to protect their rights.

We have the power, under our supervisory authority, to defer effectuation of the district court's judgment. *See* 28 U.S.C. § 2106; *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 and nn. 15, 16, 101 S.Ct. 2748, 2754 and nn. 15, 16, 69 L.Ed.2d 616 (1981). *See also Monmouth County Correctional Inst. Inmates* v. *Lanzaro*, 834 F.2d 326, 333 n.10 (3d Cir. 1987) (revising district court order granting preliminary

injunctive relief). Our reasons for doing so in this case are these:

First, as noted above, we think there remains a good possibility that the Colegio *can* operate constitutionally. The Supreme Court of Puerto Rico has listed a number of useful and important functions performed by the Colegio that are directly linked to the regulation of the legal profession and improving legal services, and it appears that an accounting system now exists for determining the direct and indirect cost of any Colegio activity, *see* 682 F.Supp. at 688 n.14. Thus, we think it appropriate to act on the assumption, shared by the district court, that the Colegio will be able to modify its rule to comply with *Hudson*.

Second, the defendants' interest in maintaining an integrated bar is sufficiently weighty that we should hesitate before halting the system completely. It seems more appropriate to allow the Colegio to continue functioning, at least temporarily, with the compelled dues of members who do not object to its activities.

Third, we think that the United States Supreme Court's recent decision on the integrated bar is likely to spur action that defendants previously may have resisted while pursuing their appeals. Before *Keller*, it had been nearly three decades since the Court addressed the integrated bar, in *Lathrop*, and the commentary since that time has questioned the nature and continuing validity of a mandatory bar. *See, e.g.*, "Unified Bar Concept," 1983 Am.B.Found.J., at 67; C. Sorenson, Jr., "The Integrated Bar and the Freedom of Nonassociation — Continuing Siege," 63 Neb.L.Rev. 30, 31 (1983). Now that *Keller* has come down, defendants have an unequivocal need to change their system to ensure its continued operation.

Fourth, we recognize that changes in the Colegio system are not easily made because of the various entities involved in decision-making. The Rule was a creature of the Supreme Court, but it rests upon a foundation of information that is the Colegio's responsibility to maintain. We therefore think it

appropriate to give defendants a substantial period of time to work out a constitutional approach to mandatory Colegio membership.

Finally, a federal court should endeavor to facilitate a proper objective of state and commonwealth government by constitutional means; it should, if possible, avoid frustration caused by the perhaps ill-advised strategies of counsel. Thus, while we understand the district court's inclination at this stage of the proceedings against further indulging the defendants and their lawyers, we think it is worth giving them the benefits of any doubts one more time.

Accordingly, we envision the following course of events:

[15] — The first task is for the Colegio, or an independent agent, to perform the verified accounting required by *Hudson*. The resulting report should categorize activities as suitable or unsuitable for mandatory funding, consistent with the criteria described in Section A above, and the report should list the cost for each activity. This accounting should enable the Colegio to set an amount for the reduction of dues of dissenting members. This accounting should strive as much as possible to reflect reality, perhaps relying on the Colegio's actual expenditures during the last several years as the basis for the projected allocation. *See Hudson*, 475 U.S. at 307 n.18, 106 S.Ct. at 1076 n.18. And in close situations, the accounting should favor the dissenter's right *not* to fund programs they find offensive.

— An independent panel (perhaps the Supreme Court or the Review Board) should review the categories of activities to determine whether all items to be funded with mandatory dues are "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the [Commonwealth].'" *Keller*, 110 S.Ct. at 2236. The panel may wish to solicit critiques and proposals from interested parties, such as plaintiffs, to ensure that the final remedy is as fully developed as possible.

— The objection procedure must be clarified or modified consistent with the district court's discussion. *See supra* pp. 626-27, 613.

— The new rule with relevant supporting materials, or some alternative, should be submitted to the district court for review *within six months* or, if a limited extension is granted, within such later period. The court must be given sufficient data to enable it to evaluate the categorization of expenses and any proposed rebate/escrow percentage. This would include, for example, copies of past Colegio budgets.

— If defendants do not modify the Colegio system within the required time, the district court's injunction will go into effect and the Colegio will be required to operate solely as a voluntary association until it stops *all* ideological activities outside its core purposes relating to the legal profession.

IV. *Stamps*

Under Puerto Rico law, lawyers must attach notarial and forensic stamps issued by the Colegio to many official documents as a means of authenticating them and as a prerequisite to filing them in court. *See* P.R.Laws Ann. tit. 4, §§ 783, 785, 1006, 1038. The stamps are sold at the Commonwealth's internal revenue offices by government employees, but all proceeds are turned over to the Colegio. The Colegio is not charged for any administrative or processing costs.

The 1986 Rule stated that stamp proceeds could be used to pay for only the following items: bar members' life insurance, legal aid to indigents, legal advice to the community, processing of complaints regarding the conduct of bar members in the practice of the profession, publication of judicial opinions "and for any other purpose comprised within the duties and purposes of the Bar Association." *Schneider*, Official Translation, slip op. at 23. The Rule specified that the funds shall not be used for "objectionable activities."

Plaintiffs complain both about the use of their tax monies to support the Colegio, through the government's involvement in selling the stamps, and the use of the stamp fees to fund Colegio activities with which they disagree. We depart in only one

respect from the district court's resolution of the stamps problem.

[16] As that court observed, if an adequate mechanism for protecting dissenters' rights is implemented, and no revenues from the sale of stamps are used to fund activities outside the Colegio's proper core functions, no constitutional problem will remain.[23] Although there still would be disparity among lawyers in the amounts paid to the Colegio, based on their need for Colegio stamps, we see no basis for challenging the Commonwealth's arguably rational judgment to impose a larger share of the burden of funding core activities on those lawyers who use the judicial system more frequently.[24]

The district court believed, however, that if no adequate method is devised to protect dissenters' rights with respect to

[23] It seems that a proper approach to the budgeting process would be to deduct, at the outset, the amount of the stamp revenues from the total estimated funds needed by the Colegio for core activities. It would then be possible to calculate the additional amount needed from dues to fund the remainder of the bar's budget, broken down into the amount needed to fund core activities and the amount needed to fund all other activities. Dissenters would be entitled to a rebate or dues reduction for the portion of dues assessed for all non-core activities.

[24] It is not the case, as plaintiffs argue, that dissenting attorneys who purchase a large number of stamps will be improperly subsidizing the Colegio's non-core activities through their stamp fees. Assuming a constitutional dues procedure is implemented, the Colegio will be required to specify the cost of its non-core activities, and those items will be funded only by means of the portion of mandatory dues that dissenters will not be charged.

Although it is true that any amount raised through stamps will not need to be raised through dues, this is not the sort of bookkeeping deception rejected by the Supreme Court in *Abood*, 431 U.S. at 237 n.35, 97 S.Ct. at 1800 n.35. The court there was referring to a system in which all members are charged the same fee but dissenting members' payments are allocated only to core purposes while other members' payments could be used for any purpose. In those circumstances, where there is no discount for dissenters, dissenters would pay more than their pro rata share of core expenses. That sort of disparity differs from the disparity in attorney purchases of Colegio stamps because the stamp fees paid by *all* lawyers, dissenting or not, receive identical treatment. Unless it were shown that, as a rule, dissenting attorneys used substantially more stamps than non-dissenting ones, there is no disproportionate burden placed on *dissenting* attorneys for the funding of Colegio core activities. There is therefore no First Amendment violation.

mandatory dues, the stamp requirements, like membership in the Colegio, must be made voluntary. The court held that restricting the use of stamp revenues to non-objectionable activities is insufficient as a solution because dissenters through their stamp purchases would then, in effect, be subsidizing ideological activities by allowing a larger portion of the voluntary dues to be used for them. We disagree. We see no difference with respect to the stamp proceeds, whether or not the Colegio can compel membership and dues, provided the stamp fees are used solely for proper core activities. In both circumstances, the Colegio has the same funds available for objectionable activities — only some portion of the dues of consenting members. Even if the Colegio chose to use all of the voluntary dues for objectionable activities, and funded its core activities solely with stamp revenues, we see no constitutional problem. The Commonwealth's decision to fund core bar association activities in that manner would put the core funding burden not on *dissenters* but on stamp purchasers. This allocation of burden does not implicate the First Amendment, and the Colegio therefore may collect and use the stamp fees for core activities whether or not it may compel membership.

[17] If the Colegio should be unable to devise a satisfactory method to protect dissenters' rights, and thus be required to change to a voluntary bar, this would affect the stamp issue in one respect. If Colegio membership is voluntary and association benefits therefore do not inure to all lawyers, it would plainly be inappropriate to use stamp revenues for any activities that, while not ideological, do not *directly* serve the core purposes of regulating the legal profession or improving the quality of legal services. To charge nonmembers fees to help pay for members' life insurance, for example, strikes us — as it did the district court — as improper. *See* 682 F.Supp. at 690. In that event, the Commonwealth would be compelling certain individuals to help pay for a *private* benefit system for other individuals, an arrangement that triggers due process concerns if not First Amendment ones. We therefore hold that,

if the Colegio becomes a voluntary association, stamp revenues may be used to finance only core activities not including "non-germane, nonideological" ones. *Hudson*, 475 U.S. at 304, n.13, 106 S.Ct. at 1074, n.13.

As a final note, if the Colegio is unable to show that stamp proceeds are, in fact, isolated from its other revenues and allocated only to appropriate activities, it would of course be barred from requiring stamp fees.[25]

With respect to the government's involvement in the sale of the stamps, we subscribe to the district court's view that no remedy is warranted. If stamp revenues are segregated appropriately, the government's assistance in selling the stamps will not support a First Amendment claim. The government simply would be involved in collecting funds that are used to promote the substantial government interests of regulating the legal profession and improving the quality of legal services available in the Commonwealth. If the Colegio cannot demonstrate that the use of stamp fees is properly limited, however, the sale of stamps would be allowed to continue only on a voluntary basis, and plaintiffs then would lack standing to challenge the government's role in the stamp program. As the district court observed, plaintiffs presumably would choose not to purchase the stamps, and their complaint therefore would depend on their status as taxpayers and the use of some portion of their tax dollar to help the Colegio finance its ideological activities.

In order to establish state taxpayer standing, plaintiffs must show that the challenged activity involves "a measurable appropriation" or loss of revenue, and "a direct dollars-and-cents injury" to themselves, *Doremus* v. *Board of Education*, 342 U.S. 429, 434, 72 S.Ct. 394, 397, 96 L.Ed. 475 (1952). *See also, e.g., District of Columbia Common Cause* v. *District of Columbia*, 858 F.2d 1, 4-5 (D.C. Cir. 1988); *Donnelly* v.

[25] For the six-month interim period, all stamp revenues, like dissenters' dues, should be placed in escrow. Defendants may, however, ask the district court to lift this requirement before the dissenters' remedy is modified upon a showing that stamp fees are fully segregated and used only for core activities.

Lynch, 691 F.2d 1029, 1030-32 (1st Cir. 1982), *rev'd on other grounds*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). Plaintiffs have failed to make such a showing. The stamps are sold at government offices that exist for another purpose, and plaintiffs do not allege that additional employees are hired to handle the stamp business. At best, it might be argued that there are some incidental expenses incurred by the government, but this does not constitute the "direct and particular financial interest" necessary to establish standing. *Doremus*, 342 U.S. at 435, 72 S.Ct. at 398.

V. *Damages*

[18] Plaintiffs contend that the district court erred in awarding each of them only $1 in nominal damages for the deprivation of their First Amendment rights. The court declined to make a higher award because "'[t]he evidence is too vague for the Court to establish through anything other than speculation, the amount of damages suffered by these Plaintiffs.'" *Schneider*, 682 F.Supp. at 691 (quoting *Schneider*, 565 F.Supp. at 979). Plaintiffs acknowledge that there was no direct proof of damages, but make an emotional appeal for financial relief in an amount reflecting the seriousness of the defendants' First Amendment violation.

We have sympathy for plaintiffs' position, and recognize the risk that nominal damages will tend to minimize the seriousness of defendants' violation and plaintiffs' injury. Nevertheless, we are unable to say the district court abused its discretion in making the $1 awards. From all that appears in the record, plaintiffs have submitted no evidence of the nature and extent of the harm they have suffered, and they have cited no precedent imposing on the court the obligation to speculate on the extent of their injury. In the absence of *any* proof of damages, we think the district court acted within its discretion in declining to award more than a nominal sum. *See Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n.11,

106 S.Ct. 2537, 2543 n.11, 91 L.Ed.2d 249 (1986) ("[N]ominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury.") (citing *Carey* v. *Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978)). *See also id.* 477 U.S. at 315-316, 106 S.Ct. at 2547 (Marshall, J., concurring) (quoting *Hobson* v. *Wilson*, 737 F.2d 1, 62 (D.C. Cir. 1984)) (injury to a First Amendment-protected interest may be compensated with substantial damages, but "only to the extent that it was 'reasonably quantifiable'").

V. *Conclusion*

We summarize our primary holdings:

1. The 1986 Rule was the product not of judicial decision-making but of Puerto Rico Supreme Court rulemaking, and the district court therefore had jurisdiction to review its merits. In addition, our review is barred neither by preclusion principles nor procedural defaults.

2. The Colegio may use mandatory dues and fees only for those expenditures that are "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the [Commonwealth].'" *Keller*, 110 S.Ct. at 2236. It may, in addition, use such funds to finance activities incidental to the operation of a bar association, such as social activities and insurance programs.

3. Activities that may be funded with compulsory dues, therefore, generally must "revolve around the role of the lawyer as lawyer, rather than relying on the lawyer's more generic role as an informed and perhaps influential member of a complex society," *see supra* p. 626. When ideological activities outside the bar's core purposes are intertwined beyond separation with activities within them, dissenters may not be charged for any portion of the challenged program.

4. The Colegio system of mandatory membership, as defined by statute and the 1986 Rule, does not presently meet constitutional standards. It defines too broadly the range of activities that may be funded with compulsory dues. Its two primary procedural defects are the failure to support the 15% escrow amount and the provision, at least on the Rule's face, that refunds are triggered only by objections to specific activities.

5. Defendants shall have six months from the date this judgment becomes final to submit a modified version of its rule, or an alternative, to the district court, during which time 100% of dissenters' dues must be held in escrow. If, at the end of that six-month period, defendants have failed to submit to the district court a procedure for resolving the constitutional problems identified in its opinion and our own, and if no extension has been granted for cause, the injunction imposed by the district court regarding compulsory dues will take effect.[26] That injunction bars the Colegio from compelling membership until it either ceases all ideological activities not germane to its core purposes or devises an adequate system to protect dissenters' rights.

6. The Colegio may collect stamp fees so long as the funds are segregated from other revenues and used only for core purposes. Plaintiffs may not challenge the use of government facilities to sell the Colegio stamps.

7. The district court award of $1 in nominal damages to each plaintiff is affirmed.

Affirmed in part, reversed in part, modified and remanded for further proceedings consistent with this opinion. Costs to plaintiffs.

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[26] We expect that defendants immediately will begin a good-faith effort to revise the Colegio's compulsory membership system, and will submit their proposal to the district court as soon as possible. We further expect that the district court will need a period of time to review that proposal. We do not intend that the injunction take effect during the review so long as it appears that defendants have made a good-faith effort to fulfill their constitutional obligations to plaintiffs. We leave it to the district court to determine when, if at all, the injunction should take effect after the six-month delay.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 88-1937

ROBERT E. SCHNEIDER, JR., ET AL.,
PLAINTIFFS, APPELLEES,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,
DEFENDANT, APPELLANT.

No. 88-1938

ROBERT E. SCHNEIDER, JR., ET AL.,
PLAINTIFFS, APPELLEES,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO, ET AL.,
DEFENDANTS, APPELLEES.

CARMEN ANA CULPEPER, ETC., ET AL.,
DEFENDANTS, APPELLANTS.

No. 88-1939

ROBERT E. SCHNEIDER, JR., ET AL.,
PLAINTIFFS, APPELLANTS,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO, ET AL.,
DEFENDANTS, APPELLEES.

BEFORE

BREYER, Chief Judge,
COFFIN, Senior Circuit Judge,
CAMPBELL, TORRUELLA*, SELYA and CYR, Circuit Judges,
PIERAS**, District Judge

ORDER OF COURT
Entered December 20, 1990

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

/s/ FRANCIS P. SCIGLIANO, Clerk

*Circuit Judge Juan R. Torruella is recused.

**Of the District of Puerto Rico, sitting by designation.

(cc: Messrs. Schneider, Jr., Anduze Montano, Ms. Rodriguez-Rodriguez)

APPENDIX C

United States Court of Appeals
For the First Circuit

Nos. 82-1538, 82-1573.

In re The JUSTICES OF THE SUPREME COURT OF PUERTO RICO,

PETITIONERS.

In re COLEGIO DE ABOGADOS DE PUERTO RICO, and Fundacion Colegio De Abogados,

PETITIONERS.

ARGUED SEPT. 15, 1982.
DECIDED DEC. 8, 1982.

Carlos V. Garcia Gutierrez, with whom Harry Anduze Montano, Santurce, P.R., was on petition for writ of mandamus, for petitioners Colegio De Abogados De Puerto Rico and Fundacion Colegio De Abogados.

Jay A. Garcia Gregory, and Miriam Naveira De Rodon, with whom Salvador Antonetti, and Jose Julian Alvarez Gonzalez, San Juan, P.R., were on petition for writ of mandamus, for petitioners the Justices of the Supreme Court of Puerto Rico.

Robert E. Schneider, Jr., Santurce, P.R., and Hector L. Marquez, San Juan, P.R., for Robert E. Schneider, Jr., et al.

Before COFFIN, Chief Judge, BOWNES and BREYER, Circuit Judges.

BREYER, Circuit Judge.

The petitioners in these cases, the Puerto Rico Bar Association (the "Colegio"), the Bar Association Foundation (the

"Fundacion"), and the Justices of the Supreme Court of Puerto Rico, seek writs of mandamus to compel the federal district court to dismiss suits that five local attorneys have brought against them. The suits, which are brought against other Commonwealth defendants as well, are part of an ongoing course of litigation attacking the constitutionality of statutes that require members of the Puerto Rico bar to support the Colegio. While the petitions were pending here, the district court dismissed some, but not all, of the claims at issue below. Given the present procedural posture of this case, we find that the Justices are entitled to a writ providing them with a portion of the relief that they seek. We find no basis, however, for issuing the writ sought by the Colegio and the Fundacion.

I

The litigation underlying this proceeding concerns the constitutionality of statutes that require members of the Puerto Rico bar to belong to and support the Colegio. Puerto Rico has an "integrated bar," meaning that an attorney who wishes to practice in the Commonwealth must belong to the Colegio. 4 L.P.R.A. § 774. As a condition of membership in the Colegio, members must pay annual dues. If a member does not pay, he is suspended from the Colegio, and an attorney who is suspended from the Colegio loses the right to practice in Puerto Rico. *Id.* §§ 774, 781-82. Commonwealth attorneys are also required to support the Colegio and the Fundacion by purchasing forensic stamps and, in their capacities as notaries, notarial stamps. *Id.* §§ 783, 1006. The proceeds from the sale of the stamps are given to the Colegio. *Id.* § 785.

The attack on the constitutionality of these statutes evidently began on November 21, 1977, when the Colegio filed disciplinary complaints in the Commonwealth Supreme Court accusing a large number of attorneys, including three of the five plaintiffs in these cases, of nonpayment of dues. Two of the present plaintiffs, Robert Schneider and Hector Ramos

Diaz, responded by attacking the mandatory membership and dues provisions as unconstitutional under both the Commonwealth and the federal constitutions. They had no occasion at the time to challenge the stamp provisions, and they subsequently withdrew their federal (but not Commonwealth) constitutional challenges to the membership and dues provisions. The Commonwealth Supreme Court, relying heavily on federal precedent, held that the membership and dues provisions were valid under the Commonwealth constitution. *Colegio* v. *Schneider*, No. 0-77-431 (P.R. Apr. 5, 1982). The court also held, however, that the lawyers were constitutionally entitled to prevent the Colegio from using their dues to support ideological causes with which they disagreed. *See Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). The court ordered Schneider and Ramos to pay their dues to the Colegio, subject to a then-unsettled "fund segregation" plan. Schneider and Ramos refused to do so, and on June 3, 1982, the Supreme Court suspended them from the practice of law.

Six days later, Schneider and Ramos sued the Colegio, the Fundacion, the Justices, and the Commonwealth Secretaries of Justice and the Treasury in federal court. Asserting federal jurisdiction on the basis of 42 U.S.C. § 1983, they attacked the membership and dues statutes again, this time expressly on federal constitutional grounds. They also attacked the constitutionality of the stamp statutes insofar as the statutes entailed using public funds for what they regarded as private purposes. Finally, they attacked the Commonwealth disciplinary proceedings as having violated their federal constitutional rights. They sought injunctions barring any of the defendants from enforcing the statutes, and damages from the Justices and the Colegio based upon the disciplinary proceedings.

Within two weeks, three more plaintiffs (only one of whom had been involved in the Commonwealth proceedings) filed similar complaints, which closely tracked the claims of Schneider and Ramos but omitted claims based on the discipli-

nary proceedings. On June 21, the Justices moved to dismiss all claims against them; the Colegio and the Fundacion followed suit with similar motions. The Justices sought an expedited decision on their motion, and when no such decision was forthcoming by early July, they sought mandamus here. Emphasizing that the litigation in general, and the possibility of discovery in particular, threatened their judicial work, they asked that we require the district court either to grant their dismissal motions outright or at least to reach an immediate decision. We stayed proceedings against them, while leaving the district court free to decide their motion for dismissal. The Colegio and Fundacion also petitioned for mandamus, requesting the same relief.

On September 13, two days before the petitions for mandamus were to be heard in this court, the district court passed on the dismissal motions of the Justices, the Colegio and the Fundacion. In a carefully reasoned opinion, it dismissed all conspiracy claims, all disciplinary and damage claims against the Colegio and Fundacion, and all claims challenging the outcome of the prior disciplinary proceedings. In essence, it left the Justices subject only to the claims for declaratory and injunctive relief against the enforcement of the membership, dues, and stamp statutes. The Colegio and the Fundacion remained subject to similar claims and certain others. The Justices, the Colegio and the Fundacion continue to seek mandamus in order to have the district court dismiss the remaining claims.

II

[1, 2] Neither the Colegio nor the Fundacion is entitled to a writ of mandamus. It is elementary that mandamus requires a showing that interlocutory relief is necessary to prevent irreparable harm. Whether the Colegio and the Fundacion wish this court to invoke its traditional mandamus power over errors of a jurisdictional nature, its "supervisory" mandamus

authority, or its "advisory" mandamus powers, they must demonstrate that something about the circumstances here would make an ordinary appeal inadequate to protect their interests. *See Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 385, 74 S.Ct. 145, 149, 98 L.Ed. 106 (1953); *United States* v. *Kane*, 646 F.2d 4, 9 n.7 (1st Cir. 1981); *United States* v. *Sorren*, 605 F.2d 1211, 1214-15 (1st Cir. 1979); *Grinnell Corp.* v. *Hackett*, 519 F.2d 595, 599 (1st Cir.), *cert. denied sub nom. Chamber of Commerce of the United States* v. *United Steelworkers of America*, 423 U.S. 1033, 96 S.Ct. 566, 46 L.Ed.2d 407 (1975). No such showing has been made. The only plausible injury that a denial of mandamus might inflict on these petitioners is the time and expense of taking part in the litigation below as it pursues its ordinary course. The Supreme Court has made clear in another context that the expense of litigation ordinarily does not constitute irreparable injury, and this court has specifically rejected the general burdensomeness of litigation as a basis for assuming mandamus jurisdiction. *See Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 1040, 39 L.Ed.2d 123 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *In re Sylvania Electric Products, Inc.*, 220 F.2d 423, 425 (1st Cir. 1955); *cf. In re Continental Investment Corp.*, 637 F.2d 1, 5-6 (1st Cir. 1980) (collateral-order doctrine). Because they have failed to show how or why they cannot obtain full relief from any of the district court's alleged errors by appealing a final judgment, the Colegio and the Fundacion have failed to establish their right to mandamus.

III

The issues that the Justices raise are more difficult. As will be discussed below, they arguably suffer a special institutional harm by being forced to remain parties in this suit against their will. Moreover, at least one of their arguments is "juris-

dictional" in nature — a traditional predicate for the issuance of a writ of mandamus. *United States* v. *Sorren*, *supra*. We therefore describe their status in the suit and their jurisdictional argument in detail.

The Justices are now essentially nominal parties in the suits against them. The district court has addressed their dismissal motion, mooting their alternative prayer that we order the district court to make a decision. Moreover, the court has decided, by and large, in their favor. All damage claims, all conspiracy claims, and (in the district court's words) all claims "seeking in any way to modify, alter, challenge or otherwise affect the outcome" of the prior disciplinary proceedings, have been dismissed. The suits against the Justices have been reduced to conventional prospective attacks on the constitutionality of Commonwealth statutes, seeking traditional injunctive and declaratory relief. The plaintiffs stated to us at oral argument that they would not conduct discovery against the Justices in light of the district court's disposition of the Justices' motion, which relieves the most immediate practical burden of the litigation. In addition, since the other defendants have adequate incentive and resources to defend the statutes, it is difficult to see that the Justices, as a practical matter, need participate further in the suits. It is certainly true that they need not bear the burden of full litigation.

Judges who occupy this kind of nominal-party position rarely object to their inclusion in suits on that ground. *See, e.g.*, *Fernandez* v. *Trias Monge*, 586 F.2d 848 (1st Cir. 1978). On the rare occasions when they have so objected, however, courts have carefully considered their claims and, in several instances, have ordered their dismissal from the suit. *See Mendez* v. *Heller*, 530 F.2d 457 (2d Cir. 1976); *Gras* v. *Stevens*, 415 F.Supp. 1148 (S.D.N.Y. 1976) (three-judge court). We therefore review the Justices' arguments with similar attention.

A. *Membership and Dues Claims*

[3, 4] Mandamus traditionally has issued to correct essentially "jurisdictional" errors; the conventional office of the writ is to restrain lower courts from acting in clear excess of their jurisdiction. *See United States* v. *Sorren*, 605 F.2d at 1215. The Justices make one strong jurisdictional argument before us. That argument, which rests on Article III of the Constitution, is that there is no "case or controversy" between the Justices and the plaintiff with respect to the membership and dues claims. It is fundamental that to be heard in a federal court, a "controversy" between litigants must be "definite and concrete, touching the legal relationships of the parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41, 57 S.Ct. 461, 463-464, 81 L.Ed. 617 (1937); *see also United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 403, 100 S.Ct. 1202, 1212, 63 L.Ed.2d 479 (1980), and *United States* v. *Johnson*, 319 U.S. 302, 305, 63 S.Ct. 1075, 1076, 87 L.Ed. 1413 (1943). Here, the Justices argue, they and the plaintiffs possess no such "adverse legal interests," for the Justices' only function concerning the statutes being challenged is to act as neutral adjudicators rather than as administrators, enforcers, or advocates.

We agree, with one qualification to be mentioned later, *see* pp. 23-24 *infra*, that the role of the Justices with respect to these statutes is adjudicative. The Commonwealth's statutes require that an attorney who wishes to practice law in Puerto Rico obtain admission to the Commonwealth bar and become a member of the Colegio. They also provide that nonpayment of dues warrants suspension from the Colegio, and that an attorney who has been suspended from the Colegio loses the right to practice. 4 L.P.R.A. §§ 774, 781. Under the statutory scheme, both the Colegio and the Secretary of Justice can bring a complaint based on nonpayment of dues before the Puerto Rico Supreme Court. 4 L.P.R.A. §§ 738, 773(g). In deciding cases based on such complaints, the Justices act as they

would in any other case based upon a Commonwealth statute: to sit as adjudicators, finding facts and determining law in a neutral and impartial judicial fashion.

We also agree that, at least ordinarily, no "case or controversy" exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute. Judges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy. They are sworn to uphold the Constitution of the United States. They will consider and decide a claim that a state or Commonwealth statute violates the federal Constitution without any interest beyond the merits of the case. Almost invariably, they have played no role in the statute's enactment, they have not initiated its enforcement, and they do not even have an institutional interest in following their prior decisions (if any) concerning its constitutionality if an authoritative contrary legal determination has subsequently been made (for example, by the United States Supreme Court). In part for these reasons, one seeking to enjoin the enforcement of a statute on constitutional grounds ordinarily sues the enforcement official authorized to bring suit under the statute; that individual's institutional obligations require him to defend the statute. One typically does not sue the court or judges who are supposed to adjudicate the merits of the suit that the enforcement official may bring. That is presumably why the plaintiffs in this case have sued the Colegio and the Secretary of Justice, the parties in whose hands the enforcement of the challenged statutes is vested.

What authority there is on the subject is consistent with these views. In *Mendez* v. *Heller*, 380 F.Supp. 985 (E.D.N.Y. 1974) (three-judge court) *(per curiam)*, *aff'd*, 530 F.2d 437 (2d Cir. 1976), a plaintiff challenged the residency requirements of New York's divorce statute and sought, *inter alia*, to enjoin several state judges from enforcing the requirement in any divorce proceeding she might bring in the future. The three-judge court held that no justiciable controversy existed be-

tween the plaintiff and the judges, and the Second Circuit affirmed on that ground. The logic of the opinion is clear:

> Normally issues, and particularly issues of constitutional dimensions, are not determined except where they are necessarily drawn in question by litigation over real and present disputes in which the interest of each party requires that it seek a determination of the issue in an opposite sense of that sought by the other party. Hence, entertainment of plaintiff's suit here requires the conclusion that there is a genuine controversy between the plaintiff and one or more of the defendants in which they have an adverse interest to hers in the determination. But [the state judge] has no such interest: if, as plaintiff contends, the statute is unconstitutional, then [the judge's] sole interest is in so determining, and in denying effect of the statute. He is not an adversary of the plaintiff, but a judicial officer bound to decide the issue according to the law as he finds it. . . . [H]is posture would be that of an entirely disinterested judicial officer and not in any sense the posture of an adversary to the contentions made on either side of the case.

380 F.Supp. at 990. In *Gras* v. *Stevens*, *supra*, Judge Friendly reached an identical conclusion in a suit challenging the constitutionality of a New York law requiring husbands but not wives to bear part of the cost of their spouses' legal representation in divorce proceedings. He concluded that state judges were not proper party defendants under § 1983 because they had no stake in upholding the statute against constitutional challenge: "If [the plaintiff] is right in thinking that § 237(a) of the Domestic Relations Law offends the equal protection clause of the Fourteenth Amendment, they are as bound to strike it down as we are." 415 F.Supp. at 1151 (footnote omitted). Although no other courts appear to have had occasion to consider the issue directly, several have alluded to it in terms

comparable to those in *Mendez* and *Gras*. *See Cavett* v. *Ellis*, 578 F.2d 567, 570 n.6 (5th Cir. 1978); *Rhodes* v. *Laurino*, 444 F.Supp. 170, 172 n.3 (E.D.N.Y. 1978), *aff'd per curiam*, 601 F.2d 1239 (2d Cir. 1979).

[5] We find the reasoning in *Mendez* and *Gras* persuasive. However, like the Second Circuit and Judge Friendly, we are reluctant to rest our decision directly on Article III when the case can be resolved on a nonconstitutional basis. *See Hagans* v. *Lavine*, 415 U.S. 528, 547, 94 S.Ct. 1372, 1384, 39 L.Ed.2d 577 (1974); *Ashwander* v. *TVA*, 297 U.S. 288, 346-47, 56 S.Ct. 466, 482-483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). We interpret *Mendez* and *Gras* as holding that under the circumstances present in those cases, judges were not proper party defendants in § 1983 actions challenging the constitutionality of state statutes. In short, § 1983 does not provide relief against judges acting purely in their adjudicative capacity, any more than, say, a typical state's libel law imposes liability on a postal carrier or telephone company for simply conveying a libelous message. *See, e.g., Mason* v. *Western Union Tel. Co.*, 52 Cal.App.3d 429, 125 Cal.Rptr. 53 (1975) (telegraph company); *Anderson* v. *New York Tel. Co.*, 42 A.D.2d 151, 345 N.Y.S.2d 740 (1973) (telephone company). Just as a dismissal for failure to state a claim would be proper in the latter case, so is it in the former. *See* Fed.R.Civ.P. 12(b)(6). By joining in this interpretation of § 1983, we avoid the constitutional problems that might be raised by a more expansive application of the statute. *See Crowell* v. *Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932). We avoid explicitly finding that Congress could not make judges proper parties in cases such as this one should it choose to do so, and we avoid the constitutional snares that might otherwise be posed by similar, but distinguishable, cases.

Among those similar but distinguishable cases is *Supreme Court of Virginia* v. *Consumers Union of America, Inc.*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), in which the Supreme Court held that the litigants before it could sue

judges to enjoin them from enforcing bar membership requirements. *See also Mandel* v. *Erickstad*, 648 F.2d 1175 (8th Cir. 1981); *Person* v. *Association of the Bar of New York*, 554 F.2d 534 (2d Cir.), *cert. denied*, 434 U.S. 924, 98 S.Ct. 403, 54 L.Ed.2d 282 (1977); *Austin* v. *Municipal Court*, 235 F.2d 836 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 923, 77 S.Ct. 682, 1 L.Ed.2d 720 (1957). In *Consumers Union*, unlike the case before us, the requirements under attack were promulgated by the judges themselves in the form of court rules; the judges had acted in a legislative capacity, which made their involvement in the litigation more direct and which gave them an institutional stake in the litigation's outcome. It is therefore not surprising that the Supreme Court in *Consumers Union*, as well as the courts of appeals in *Mandel*, *Person*, and *Austin*, have treated the judicial defendants as having acted in a nonadjudicatory (enforcement) capacity. There is no reason to read into these cases any further conclusion that plaintiffs can appropriately sue judges whenever they attack a statute as unconstitutional, nor is there any reason for us to question these cases in arriving at the result we reach here.

Other categories of suits are equally distinguishable. For example, judges are frequently named as defendants when litigants seek writs of mandamus, prohibition, and the like. In such instances, unlike this case, the judge is named as a party as a matter of proper form; the writ is a traditional and well-accepted procedural device for transmitting instructions from one court to another, and there are sound procedural reasons for making the judge a formal participant in an ongoing controversy over his disposition of an existing suit.

[6, 7] In still other suits, it is arguably necessary to enjoin a judge to ensure full relief to the parties. *Cf. WXYZ, Inc.* v. *Hand*, 658 F.2d 420 (6th Cir. 1981) (plaintiff obtains injunction against state court enforcement of prior court suppression order). Such cases are unusual, for a court should not enjoin judges from applying statutes when complete relief can be afforded by enjoining all other parties with the authority to

seek relief under the statute. *See General Motors Corp.* v. *Buha*, 623 F.2d 455, 463 (6th Cir. 1980); *United Steelworkers of America* v. *Bishop*, 598 F.2d 408, 413 (9th Cir. 1979); *Lamb Enterprises, Inc.* v. *Kiroff*, 549 F.2d 1052, 1060 (6th Cir.), *cert. denied*, 431 U.S. 968, 97 S.Ct. 2926, 53 L.Ed.2d 1064 (1977). Indeed, it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion. *See Davis* v. *Page*, 640 F.2d 599, 605 (5th Cir. 1981) *(en banc), vacated on other grounds sub nom. Chastain* v. *Page*, ____ U.S. ____, 102 S.Ct. 3504, 73 L.Ed.2d 1380 (1982); *cf. Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F.Supp. 117, 133 (S.D.N.Y. 1969) (three-judge court) (Friendly, J.), *aff'd*, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971). In any event, there is no relief-related basis for including the judges in this law suit.

We recognize the existence of cases similar to this one, other than *Mendez* and *Gras*, in which courts have entertained suits against judges that attack statutes related to the judicial process or statutes previously enforced by the particular judge against the plaintiff. *See, e.g., Fernandez* v. *Trias Monge, supra; Stivers* v. *Minnesota*, 575 F.2d 200 (8th Cir. 1978), *cert. denied*, 439 U.S. 1127, 99 S.Ct. 1043, 59 L.Ed.2d 88 (1979); *Fowler* v. *Alexander*, 478 F.2d 694 (4th Cir. 1973). In such cases, however, plaintiffs typically have been denied relief — although on grounds other than justiciability. Where plaintiffs have obtained relief, the justiciability issue has not been raised. We have found only one case in which a federal court enjoined state judges from enforcing a state statute; and no party in that case appears to have presented the "case or controversy" question. *Kendall* v. *True*, 391 F.Supp. 413 (W.D. Ky. 1975).

Before concluding that the Justices are correct, however, we must turn to the qualification mentioned earlier, *see* p. 21 *supra* — a qualification as to our statement that the Justices' role is adjudicatory. The Commonwealth Supreme Court has long claimed an *inherent* disciplinary power over members of

the bar, including the power to discipline attorneys for causes other than those enumerated by statute. *See Colegio* v. *Barney*, No. 0-80-199 (P.R. June 17, 1980), slip op. at 3; *in re Liceaga*, 82 P.R.R. 245, 248-49 (1961); *In re Abella*, 67 P.R.R. 211, 219 (1947); *In re Gonzalez*, 65 P.R.R. 357, 367 (1945); *In re Bosch*, 65 P.R.R. 232, 234 (1945); *In re Tormes*, 30 P.R.R. 248, 249-50 (1922). Moreover, the Supreme Court has asserted the general power to initiate a disciplinary proceeding itself, regardless of the involvement of the Colegio or the Secretary of Justice. *See, e.g., In re Gonzalez*, 65 P.R.R. at 367-68. Insofar as the plaintiffs direct their claims against the exercise of this disciplinary power, they are suing the Justices as "enforcers" rather than as "adjudicators." *See Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. at 736 & n.15, 100 S.Ct. at 1977 & n.15.

[8] A review of the way in which the judges have exercised their enforcement power, however, makes clear that there is virtually no likelihood that this nonstatutory power could, or would, ever be exercised to enforce the membership and dues requirements at issue here. The Justices' attorneys have assured us that this power is exercised only with respect to attorney misconduct that occurs in proceedings before the Supreme Court itself. Even if that assurance is overstated, the court's exercise of its power has been limited to instances of actual misconduct, whether the misconduct has taken place in front of the Supreme Court or in a court below. *See, e.g., In re Gonzalez, supra* (Supreme Court initiates proceedings against attorney who filed defamatory pleadings in lower court). We can find no cases to the contrary. As long as the statutes exist, the Court will proceed to adjudicate under the statutes. Should the plaintiffs succeed in setting aside the statutes, nonpayment of dues or refusal to join the Colegio would not constitute misconduct. There is thus no reason to believe that the Justices would penalize any such activity.

The Supreme Court has recognized that the mere existence of enforcement power does not create a justiciable controversy

under Article III with enforcement officials. *See Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. at 736 n.15, 100 S.Ct. at 1977 n.15. Indeed, as applied to challenges to regulatory and criminal statutes, federal courts have taken Article III to require a showing not only that the plaintiff is reasonably likely to engage in proscribed (but allegedly constitutionally protected) conduct, but also that the officials responsible for enforcing the challenged statute are reasonably likely to prosecute the plaintiff when he does so. *See Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979); *O'Shea* v. *Littleton*, 414 U.S. 488, 493-98, 94 S.Ct. 669, 674-677, 38 L.Ed.2d 674 (1974); *Poe* v. *Ullman*, 367 U.S. 497, 507, 81 S.Ct. 1752, 1758, 6 L.Ed.2d 989 (1961) (plurality opinion); *McCollester* v. *City of Keene*, 668 F.2d 617, 618-21 (1st Cir. 1982); *International Society for Krishna Consciousness* v. *Eaves*, 601 F.2d 809, 818 (5th Cir. 1979). *But cf. Epperson* v. *Arkansas*, 393 U.S. 97, 101-02, 89 S.Ct. 266, 268-269, 21 L.Ed.2d 228 (1968) (Supreme Court reaches merits of attack on Arkansas statute despite the fact that "[t]here is no record of any prosecutions in Arkansas under its statute.").

Again, we need not reach the Article III question directly here, for in light of these cases, and in light of the fact that the plaintiffs have made no representations in their complaint or in argument before us concerning a genuine risk of enforcement by the Justices, *cf. Dewey* v. *University of New Hampshire*, 694 F.2d 1 (1st Cir. 1982), the plaintiffs' complaint does not state a claim against the Justices in their enforcement capacity.

[9, 10] We conclude that the plaintiffs have failed to state any claim against the Justices concerning the membership and dues statutes. We also believe that mandamus is an appropriate remedy to bring about the dismissal of those claims. Mandamus traditionally requires a showing of "jurisdictional" error, but courts look to the practical nature of the claim of error rather than to its formal label. *See United States* v. *Lasker*,

481 F.2d 229, 235 (2d Cir. 1973), *cert. denied*, 415 U.S. 975, 94 S.Ct. 1560, 39 L.Ed.2d 871 (1974); *see also In re United States*, 565 F.2d 173 (1st Cir. 1977); *In re La Providencia Development Corp.*, 406 F.2d 251 (1st Cir. 1969). Our decision here, while formally resting on the plaintiffs' failure to state a claim, is so influenced by Article III-type jurisdictional considerations that it falls within the scope of our traditional mandamus authority. Arguably, this case falls within the terms of our "advisory" mandamus power as well. The issue presented is novel in this circuit, it is important, and given the number of new plaintiffs who have joined these proceedings and the possibility of parallel proceedings, it may well recur before further appellate review is possible. *See Grinnell Corp.* v. *Hackett*, 519 F.2d at 599.

More importantly, the type of harm that would be caused by remitting the Justices to the ordinary appellate process here is not that suffered by an ordinary litigant who is forced to wait until the conclusion of a lawsuit to cure legal errors on appeal. To require the Justices unnecessarily to assume the role of advocates or partisans on these issues would tend to undermine their role as judges. To encourage or even force them to participate as defendants in a federal suit attacking Commonwealth laws would be to require them to abandon their neutrality and defend as constitutional the very laws that the plaintiffs insist are unconstitutional — laws as to which their judicial responsibilities place them in a neutral posture. Indeed, a public perception of partiality might well remain even were the Justices to take no active part in the litigation. The result risks harm to the court's stance of institutional neutrality — a harm that appeal would come too late to repair. While at times such harms may have to be tolerated in order to afford proper relief to a party, we believe that they warrant the exercise of our mandamus power here, when no relief question is at issue and when the plaintiffs, for reasons of a jurisdictional sort, have failed to make out a case against the Justices.

B. *The Forensic and Notarial Stamp Claims*

The Justices did not make a similar Article III-type jurisdictional argument concerning the stamp claims in the court below. The plaintiffs' stamp claims, like their other claims, contest the constitutionality of Commonwealth statutes, in this instance those requiring forensic and notarial stamp purchases whose proceeds go to the Colegio. The Justices' Article III position with respect to these claims, however, may be different, for here the Justices, and particularly the Chief Justice, may occupy a special administrative position. *See* 4 L.P.R.A. § 1038. The plaintiffs have a plausible argument that they are suing the Justices in their "administrative" rather than their "adjudicative" capacity. If the Justices believe the contrary, they must make their argument first in the district court.

[11, 12] None of the Justices' objections to the plaintiffs' claims warrants issuance of a writ of mandamus, for each objection is either incorrect or nonjurisdictional, or both. The Justices' argument that they are simply immune from suit for injunctive or declaratory relief is wrong; the district court correctly held that there is no such absolute immunity and that injunctions can be issued against judges in an appropriate case. *See Harris* v. *Harvey*, 605 F.2d 330 (7th Cir. 1979) (dictum), *cert. denied*, 445 U.S. 938, 100 S.Ct. 1331, 63 L.Ed.2d 772 (1980); *Heimbach* v. *Village of Lyons*, 597 F.2d 344 (2d Cir. 1979) *(per curiam)*; *Rud* v. *Dahl*, 578 F.2d 674 (7th Cir. 1978) *(per curiam)*; *Kelsey* v. *Fitzgerald*, 574 F.2d 443 (8th Cir. 1978) *(per curiam)*; *Briggs* v. *Goodwin*, 569 F.2d 10 (D.C. Cir. 1977) (dictum), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978); *Shipp* v. *Todd*, 568 F.2d 133 (9th Cir. 1978) *(per curiam)*; *Person* v. *Association of the Bar of New York*, *supra*; *Timmerman* v. *Brown*, 528 F.2d 811 (4th Cir. 1975); *Hansen* v. *Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975); *Fowler* v. *Alexander*, 478 F.2d 694 (4th Cir. 1973); *Littleton* v. *Berbling*, 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom. O'Shea* v. *Littleton*, 414 U.S. 489, 498, 94

S.Ct. 669, 677, 38 L.Ed.2d 674 (1974); *Jacobson* v. *Schaefer*, 441 F.2d 127 (7th Cir. 1971); *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, *supra*. The Justices' argument that the plaintiffs' claims are barred by res judicata and collateral estoppel is not jurisdictional, and we do not see in any event how it applies to stamp claims whose merits have not previously been decided.

[13] The facts that the stamp claims were only mentioned in dicta in the previous disciplinary suits before the Commonwealth Supreme Court, and that some of the plaintiffs here did not participate in those suits, disposes of the Justices' claims based on *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) (forbidding federal district courts from asserting appellate jurisdiction over state court judgments). The Justices also argue that abstention is proper under *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), but there is no current Commonwealth proceeding involving the stamp statutes to which the district court can defer. Finally, the Justices argued at length that the membership and dues claims were outside the subject matter jurisdiction of the district court because they did not present substantial federal questions, *see, e.g.*, *Hagans* v. *Lavine*, 415 U.S. at 536-38, 94 S.Ct. at 1378-1379; *Bell* v. *Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), but they have raised no similar argument about the stamp claims, perhaps wisely.

The Justices do argue that the district court is barred from hearing the stamp claims by the Butler Act, 48 U.S.C. § 872, which provides in relevant part that "[n]o suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico." The Justices argue that the stamp fees at issue are "taxes" within the meaning of the Butler Act. The district court rejected this argument, noting that whether or not the stamp fees constitute a "tax" for purposes of the Act presents a question of federal law rather

than one of Commonwealth law, as the Justices' brief suggests. *See Robinson Protective Alarm Co.* v. *City of Philadelphia*, 581 F.2d 371 (3d Cir. 1978) (construing meaning of "tax" in Tax Injunction Act of 1937).

[14] This court has construed the Butler Act *in pari materia* with the Tax Injunction Act of 1937. *Carrier Corp.* v. *Perez*, 677 F.2d 162, 164 (1st Cir. 1982). The Tax Injunction Act was enacted because otherwise,

> "state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state law, which ... are more properly heard in the state courts."

Rosewell v. *LaSalle National Bank*, 450 U.S. 503, 527, 101 S.Ct. 1221, 1236, 67 L.Ed.2d 464 (1981) (quoting *Perez* v. *Ledesma*, 401 U.S. 82, 128 n.17, 91 S.Ct. 674, 699 n.17, 27 L.Ed.2d 701 (1971) (Brennan, J., concurring in part and dissenting in part)). Since these concerns are not significantly implicated when the revenue scheme under attack devotes all of the funds that it generates to a bar association rather than to the treasury, 4 L.P.R.A. §§ 785(b), 1006, we find no clear error in the district court's finding that the Butler Act does not apply.

[15] To repeat, the Justices' position in the stamp litigation is that of a nominal party. They will not suffer discovery; they need not appear; and since other parties (including the Commonwealth Secretary of Justice) are prepared to defend the statutes on their merits, they need not take a position or even file a brief. Their arguments are insufficient to show any clear

jurisdictional error in the district court's failure to dismiss them at this stage of the proceedings, at least since they may possess administrative responsibilities in respect to the stamp statutes that would make them a proper party for purposes of "case or controversy." *Cf. Supreme Court of Virginia* v. *Consumers Union*, *supra*. We do not see how the maintenance of the stamp suits against them as purely nominal parties could affect the functioning of, or any judgment of, their court or any other Commonwealth court so as to warrant the exercise of any "supervisory" or "advisory" power of mandamus that we might have. The petition in respect to the stamp claims is therefore denied.

IV

The petition of the Colegio and the Fundacion for a writ of mandamus is denied. The petition of the Justices for a writ of mandamus is granted in part and denied in part. A writ shall issue in accordance with this opinion, requiring the district court to dismiss the claims against the Justices insofar as they involve Puerto Rico's system of compulsory bar membership and compulsory payment of bar dues.

So ordered.

APPENDIX D

United States Court of Appeals
For the First Circuit

Nos. 83-1586 to 83-1589.

Jorge F. ROMANY, et al.,
PLAINTIFFS, APPELLEES,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,
DEFENDANT, APPELLANT.

Oreste Ramos DIAZ, et al.,
PLAINTIFFS, APPELLEES,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,
DEFENDANT, APPELLANT.

Jorge SOUSS, et al.,
PLAINTIFFS, APPELLEES,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,
DEFENDANT, APPELLANT.

Robert E. SCHNEIDER, et al.,
PLAINTIFFS, APPELLEES,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,
DEFENDANT, APPELLANT.

ARGUED FEB. 6, 1984.
DECIDED AUG. 23, 1984.

Laurence H. Tribe, Cambridge, Mass., with whom Kathleen Sullivan, Boston, Mass., and Susan Estrich, Cambridge, Mass., were on brief, for defendant, appellant.

Marvin S. Cohen, Washington, D.C., with whom John M. Gibbons, Stroock & Stroock & Lavan, Washington, D.C., Robert E. Schneider, Washington, D.C., and Hector L. Marquez, San Juan, P.R., were on brief, for plaintiffs, appellees.

Before CAMPBELL, Chief Judge, WISDOM,* Senior Circuit Judge, and BREYER, Circuit Judge.

LEVIN H. CAMPBELL, Chief Judge.

This appeal from the United States District Court for the District of Puerto Rico brings before us for the second — and perhaps not the last — time a dispute over compelled membership in Puerto Rico's integrated bar. *See In re the Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982). While we described many of the particulars in our earlier opinion, and while the facts were comprehensively stated by the district court, 565 F.Supp. beginning at 965, we restate them here with particular attention to events that have taken place in the Supreme Court of Puerto Rico as well as those in the federal court.

I.

The Commonwealth of Puerto Rico has an integrated bar association known as the Colegio de Abogados de Puerto Rico ("Colegio"). While the Colegio's antecedents date back to the days of Spanish rule, the present Colegio was created in May of 1932 by Act No. 43, P.R.Laws Ann. tit. 4, § 771 *et seq*. The terms of that statute are not unlike statutes in force in 32 states of the union which likewise have integrated bars, *i.e.*, associations to which all lawyers are compelled to belong.[1]

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*Of the Fifth Circuit, sitting by designation.

[1] *See Lathrop* v. *Donahue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) (approving the Wisconsin unified bar). For one scholar's overview and his critique of the present status of such groups, *see* T. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 A.B.F.Res.J. 1.

The Colegio's express statutory duties are to "cooperate in the improvement of the administration of justice," "defend the rights and immunities of lawyers," promote fraternal relations, and "maintain healthy and strict professional morals among the members."[2] Membership in the Colegio is compulsory for all lawyers in Puerto Rico, and each member must pay the prescribed dues on pain of suspension from his right to practice.[3] Besides collecting dues, Puerto Rico law empowers the Colegio to issue forensic stamps which every Puerto Rico lawyer must affix to the initial document he files in any judicial proceeding, and to collect and use the proceeds from their sale. Puerto Rico law also authorizes the Colegio to issue and to receive proceeds from the sale of notarial and other required stamps.

The dispute which underlies the present appeal is a claim by plaintiff attorneys that their associational rights under the first and fifth or fourteenth amendments of the United States Constitution are violated by being compelled to belong to the Colegio.[4] Particularly outrageous, in their view, is the Colegio's practice of taking public positions on controversial issues far removed from the immediate concerns of lawyers as a class —

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[2] The Colegio's statutory powers include adopting and establishing professional ethics, receiving and investigating complaints on the conduct of lawyers (a power also held by the Attorney General of Puerto Rico) and instituting disbarment proceedings before the Supreme Court of Puerto Rico. Also the Colegio is to develop members' insurance programs, and create a non-profit bar foundation for handling legal aid.

[3] The Supreme Court of Puerto Rico has held that it alone controls bar entry, and that legislation of this type regulating the right to practice law is advisory only. *Ex parte Jimenez*, 55 P.R.R. 51 (1939). However, the court has indicated its approval of Law No. 43 "as satisfactory legislation to aid this court in regulating admissions to the bar and the conduct of its members." *In re Bosch*, 65 P.R.R. 232, 235 (1945). Accordingly, the court has suspended lawyers, including two of the plaintiffs in this suit, from practice for nonpayment of Colegio's dues.

[4] *See Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572, 599-601, 96 S.Ct. 2264, 2279-80, 49 L.Ed.2d 65 (1976) (leaving upon the question whether due process guarantees against actions of the government of Puerto Rico emanate from the fifth or fourteenth amendments).

associate with, or pay dues and fees to a group that publicly identifies with views with which plaintiffs disagree and which they perceive as immaterial to any legitimate professional interest which the integrated bar may be formed to promote.

A. *Proceedings before the Supreme Court of Puerto Rico*

This dispute first surfaced in 1977 when the Colegio complained to the Supreme Court of Puerto Rico against 99 attorneys, including three of the five plaintiffs, for failure to pay prescribed membership dues to the Colegio. Most of the delinquents soon paid up, but two of those who later became plaintiffs below did not. These two attorneys, Robert F. Schneider, Jr., and Hector R. Ramos Diaz, raised affirmative defenses in the Supreme Court of Puerto Rico. Initially they pleaded both the Puerto Rico and United States Constitutions by way of defense, but subsequently they attempted to withhold and reserve their federal claims under purported analogy with *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

On April 5, 1982, after argument and upon findings by a special master, the Supreme Court of Puerto Rico issued an opinion holding that the two lawyers had a duty to pay dues to the Colegio, and ordering them to do so. *Colegio* v. *Schneider*, 112 D.P.R. 540 (1982).

In upholding compulsory bar membership and compulsory financial support, the Supreme Court of Puerto Rico relied heavily upon federal constitutional precedents, including *Lathrop* v. *Donahue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191, *see* note 1, *supra*, although it acknowledged that the litigants were pressing only claims under the Constitution and

laws of Puerto Rico. The court also relied upon a distinctive tradition of compulsory bar associations in civil law jurisdictions and upon the socio-political circumstances of Puerto Rico.

Bar associations in civil law jurisdictions, it explained, have "from time immemorial" enjoyed both compulsory membership and a "primarily political role." In Spain and France their political involvement led, from time to time, to the termination of their privileges — including of compulsory membership — by "absolutist" regimes opposed to the "liberties they professed." *Colegio* v. *Schneider*, 112 D.P.R. 540, 550-51 (1982) (official translation). In Puerto Rico, the court stated, the bar association had enjoyed compulsory membership, from its establishment by Royal Decree in 1840,

> until it was suppressed by General John R. Brooke during the United States military government on the Island. U.S. Department of War, *General Orders and Circulars*, 1898-1900, G.O. 20 of December 3, 1898. Instead of the Bar Association of Puerto Rico, it established a colorless entity, which was voluntary and which led a precarious life until the present Bar Association was created by Act No. 43 of May 14, 1932.

Id. at 544-45. That legislation, the court noted, revived one of Puerto Rico's "most ancient and respected institutions." *Id.* at 547.

"The singular socio-political circumstances of Puerto Rico" also buttress the constitutionality of Law No. 43. *Id.* at 549.

> Institutions such as the Bar Association — the Legislature has extended the compulsory membership to many other groups — fulfill a very special mission in our society. Contrary to the strongly pluralistic character of North American society, our milieu has traditionally been monolithic, lacking the many independent voices that

> make such great contributions to the health of the democratic way of life.

Id. at 547. The establishment of a strong bar association, then, with compulsory membership, serves the "public interest in the creation of a strongly pluralistic society, in furtherance of the practice of law and [in] the good operation of the judicial system. . . ." *Id.* at 549. The bar association exists not merely "for the strict interest of a class [*i.e.*, lawyers], but also for the good operation of justice in our country and the social advancement of the community." *Id.* at 547. These interests "outweigh[ ] the personal inconveniences that compulsory membership might entail." *Id.* at 549. Hence, even though Colegio enjoys compulsory membership, the court held, it has "ample freedom of speech under the provisions of art. II, Sec. 4 of the Constitution [of Puerto Rico]" and "need not be a quiet and blushing entity, afraid to use the voice granted it by the very pluralistic purpose it should serve. . . ." *Id.* at 551.

The court explained, however, that the Constitution of Puerto Rico also protects the Colegio's dissenting members as "the sense of the freedom of speech clause contained in Art. II, Sec. 4 of the Constitution of Puerto Rico is not narrower than that given by the United States Supreme Court to the First Amendment" in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). Accordingly, while the Colegio is entitled to speak out boldly on ideological matters,

> [L]awyers who dissent from such pronouncements — and not those who object to the Bar Association's performance of its statutory purposes or of those imposed by this Court — enjoy, under the Constitution of Puerto Rico, the right to raise objections to the use of their contributions or of part thereof for ideological activities they do disapprove. Such disapproval may be of a general nature, as it was expressed in *[Railway Clerks]* v. *Allen*, 373 U.S. 113 [83 S.Ct. 1158, 10 L.Ed.2d 235] [(1963)] and in *Abood*.

112 D.P.R. at 554-55.

In the fifth and final part of its opinion, headed "The Remedy," the Supreme Court of Puerto Rico instructed the Colegio, not later than the date set for collecting its next annual dues, to devise a method for ascertaining that contributions[5] of a dissenting member shall not be used for ideological purposes. The court said the method "shall duly follow the principles laid down in *[Machinists* v.] *Street*, [367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961),] *Allen* and *Abood*." Other directions were included.

A month after issuing the above opinion, the Supreme Court of Puerto Rico issued a resolution dated May 6, 1982, retaining jurisdiction,

> to take cognizance of any issue regarding the fifth and last part of our judgment of April 5, 1982, and also to approve, disapprove or finally modify the remedy that shall be drawn.

The above resolution was followed, a month later, by the Puerto Rico court's further resolution suspending the two plaintiffs from practice. The court found they had disregarded directions in its opinion of April 5, 1982, to pay their Colegio dues within 15 days, "while the remedy mentioned in the opinion is being implemented."

B. *The Federal Suit*

Soon thereafter, on June 9, 1982, the two suspended attorneys brought the present action in the federal district court. Relying now on the federal Constitution, they challenged the

[5] There is a dispute between the parties on appeal whether the Supreme Court's order intended that the Colegio devise a method to prevent bar stamp fees, as well as dues, emanating from a dissenter, from being used "for ideological purposes." The Colegio insists that the Supreme Court meant to cover stamp fees also. The district court and the plaintiffs think otherwise. We assumed the correctness of the latter position in *In re the Justices of the Supreme Court of Puerto Rico*, 695 F.2d at 26.

requirement that lawyers belong and pay dues and stamp fees to the Colegio.[6] The three other plaintiffs brought similar separate actions a short time later.

C. *The Colegio's Plan for Dissenter Refunds*

At about the same time the federal proceedings were getting underway, the Colegio announced certain steps that it was taking under the Puerto Rico Supreme Court's directive to devise a plan for avoiding use of dissenters' payments for ideological activities. On June 25, 1982, the president of the Colegio filed the first of two informative motions in the Supreme Court of Puerto Rico explaining the Colegio's views on what constituted "ideological purposes." This document suggests that, in the Colegio's view, only partisan political statements will qualify as "ideological" for purposes of the court's opinion. The document also seems to define all of the Colegio's past

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[6] Robert F. Schneider, Jr., and Hector R. Ramos Diaz, the two attorneys who were suspended in the proceeding before the Supreme Court of Puerto Rico, not only sought injunctive and declaratory relief against the Colegio, the Commonwealth Secretaries of the Treasury and of Justice, and the Justices of the Supreme Court, based on the alleged unconstitutionality of the statutes compelling bar membership and payment of dues and stamp fees, but also sought damages. They charged that the disciplinary proceeding leading to their suspensions was unconstitutional and grew out of a conspiracy between the Colegio and the Justices.

The district court dismissed Schneider's and Hector Ramos's damages claims against the Justices and, for the most part, against Colegio on immunity grounds, and their claims challenging the outcome of the prior disciplinary proceedings as barred by *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). Other claims against the Justices, with minor exception, were also dismissed. The district court, however, rejected the defendants' argument that the doctrines of collateral estoppel and res judicata foreclosed Schneider's and Ramos's claims for prospective relief from the operation of Law No. 43 and allied statutes. The district court examined the preclusive effect that would be afforded the disciplinary proceeding by a Puerto Rico court, finding that further litigation was permissible. *See Migra* v. *Warren City School District Board of Education*, ___ U.S. ___, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Allen* v. *McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). The parties have not challenged these rulings, which are reported at 546 F.Supp. 1251 (D.P.R. 1982).

and intended pronouncements as falling outside of that definition.

In December 1982 the Colegio filed another informative motion, this one notifying the Supreme Court of Puerto Rico that it had adopted regulations creating a seven-member board to be known as "The Review Board of the Activities of the Colegio de Abogados of Puerto Rico."[7] The Board's function was said to be to classify the Colegio's activities "on the basis of the definition of ideological activities contained in the Informative Motion of June 25, 1982." See above. Lawyers who "at the time of payment of annual dues have affirmatively expressed their objection to the use of their money for ideological purposes," as defined, may file a complaint within 30 days after an action they object to. The board may summarily dismiss the complaint if deemed insufficient, or it may schedule a public hearing. After a full public hearing (and possible appeal to the Supreme Court of Puerto Rico) the board may grant the objector a proportionate refund from his contribution. It may also grant similar refunds to other lawyers who (1) have earlier indicated objection to having their dues used for ideological ends, and (2) within 30 days have requested in writing the specific refund.

Since being advised of the Colegio's plan through the medium of these motions, the Supreme Court of Puerto Rico has not approved or disapproved it. However, on June 30, 1983 — two weeks after the district court decided the present case — it issued a resolution, stating "the remedy adopted by the Bar Association following our April 1982 opinion, is still before our consideration pending approval, modification, or rejection." Then, on October 20, 1983, the court issued another resolution inviting Schneider and Hector Ramos to comment on the Colegio's remedy and to propose any modifications or alternate measures. At the same time the court in-

[7] The first Board was elected in the fall of 1982 after balloting upon a slate of seven names submitted to the membership by the Colegio's Board of Governors. Write-ins were, however, allowed.

vited the Colegio to comment in light of its experience with the Review Board and the regulations.

The present appeal (*i.e.*, from the judgment of the district court) was argued before us in February 1984.

D. *The District Court's Decision*

We now describe the district court's opinion and injunction which came down on June 16, 1983, following an evidentiary hearing and full argument and briefing. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F.Supp. 963 (D.P.R. 1983).

The district court held that, without question, "the Colegio engages in ideological and/or political activism of a pervasive and continuous nature, totally unrelated to the stated legislative purposes for which it was created." In support of this finding, the court listed matters on which the Colegio had taken positions, many of which are highly controversial and are beyond the specialized concerns of lawyers. While plaintiffs and presumably others differed from the Colegio's position, the court found that in annual appearances before the United Nations Decolonization Committee the Colegio's president has represented as the view of "*all* the members of the Colegio" that Puerto Rico is a colony of the United States. *Id.* at 966. Such ideological expressions, the district court felt, were "hardly discouraged by the Supreme Court of Puerto Rico's decision in *Colegio de Abogados de Puerto Rico* v. *Schneider* . . . ." The district court ended this portion of its opinion with the observation "if one thing is clear in this case, it is the proliferation of the Colegio's ideological and/or political activities."

The district court went on to hold that the Colegio was a state actor for purposes of section 1983 — a point not now in dispute.

And finally the district court held that the Colegio's use of mandatory fees for political and ideological purposes was unconstitutional, and that the remedy structured by the Colegio pursuant to the Supreme Court of Puerto Rico's order, was a

"sham." *Id.* at 977. In the district court's view, it was doubtful whether the Supreme Court of the United States would regard a refund remedy, such as the one approved in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), as appropriate on the present facts. The district court thought the instant situation was "light years apart" from the labor union situation in *Abood*. But even if *Abood* controlled, the district court found the Colegio's review board regulation to fall "considerably short of the mark." It was "illustrative of the cynicism and bad faith with which the Colegio has been handling the entire subject matter of the present suits." The court made this statement after analyzing the elaborate procedure established by the Colegio, which it described as merely an opportunity for the dissident "to engage the Colegio in bureaucratic shadow-boxing."

The district court concluded that Puerto Rico's integrated bar was *on its face* constitutional, citing *Lathrop* v. *Donahue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 but that the "cold letter of these statutes" does not reflect "the true facts of life."

> "As shown, the long-standing, pernicious and massive ideological and political practices, which have until recently been tolerated *sub silentio* and which are presently encouraged by the very state agencies charged with control and regulation of the integrated bar, present a very different picture as to how Law 43 and the related statutes are actually administered. These practices, we have held, are clearly unconstitutional. Such flagrant violations of the civil rights of Plaintiffs cannot be allowed to continue if *their* constitutional rights have any worth other than one of purely academic value. . . . They affect Plaintiffs' means of earning their livelihood in their chosen profession, and require that the court in the protection of their rights, and because of the magnitude of these violations, exercise its equitable powers to the fullest extent to prevent further violations by Defendants."

565 F.Supp. at 978.

The district court ruled that "until such time as the Colegio ceases to engage in ideological and/or political activism," all defendants except the Justices of the Supreme Court of Puerto Rico are enjoined from taking any action of any type against Colegio members for nonpayment of any due or fee. They were further enjoined from denying anyone the right to practice law or engage in notarial practice by reason of their failure to pay any due or fee to the Colegio. They were also enjoined from selling forensic or notarial stamps on behalf of the Colegio or "from forwarding to the Colegio the proceeds of any public funds collected on behalf of or for the Colegio, including but not limited to the sale of forensic or notarial stamps." Finally, these defendants were enjoined from denying full legal validity to any pleading, public instrument or deed because they do not contain forensic or notarial stamps.

The court also issued a declaratory judgment, declaring unconstitutional "as interpreted, enforced, and applied" various portions of Law No. 43 and other statutes providing for the Colegio to receive the proceeds from the sale of bar stamps. Nominal damages of $1 each were also awarded to three of the plaintiffs against the Colegio.

The district court refused to stay its judgment, *Schneider* v. *Colegio de Abogados de Puerto Rico*, 572 F.Supp. 957 (D.P.R. 1983), and the Colegio appealed. This court has since stayed the district court's judgment pending appeal.

II.

On appeal, the Colegio argues that the district court's sweeping injunction, bringing all Colegio funding and activities to a halt until the Colegio withdraws from ideological and partisan activism, protects dissenters' first amendment associational rights "not with a scalpel but with a bludgeon."[8] The

[8] Neither the Justices of the Supreme Court of Puerto Rico, who remained nominal parties below, nor the Commonwealth Secretaries of the Treasury and of Justice took appeals.

Colegio additionally argues that the district court erred "by reaching the merits while the Supreme Court of Puerto Rico undertakes, in pending proceedings, to fashion a remedy for the very grievances that underlie the federal complaint."

Appellees respond that only a remedy such as the district court provided could suffice to protect plaintiffs, since "no remedial system addresses coerced association," and since the Colegio's proposed remedy was totally ineffective. Against appellant's abstention argument, appellees posit that the Supreme Court of Puerto Rico has fully announced its position, and has indicated no serious intention to redress the Colegio's "sham" remedy. Appellees contend this case does not fit within the guidelines for abstention.

As we shall discuss below, we agree with appellant that the district court should have abstained while retaining jurisdiction, thus allowing the Supreme Court of Puerto Rico a reasonable time within which to review the Colegio's remedy, and to accept, reject or modify it. We therefore vacate the injunction without ruling on the merits of the district court's analysis, and direct that the district court await action by the Puerto Rico court before proceeding to the merits of the matters before it. We do not say the district court must await indefinitely, but we think the Supreme Court of Puerto Rico must be allowed an opportunity to complete the process initiated but not completed in its opinion of April 5, 1982.

A recent Supreme Court decision makes it plain, however, that appellees cannot constitutionally be forced to pay full dues to the Colegio during the interim period before this litigation is finally resolved. *Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks*, ____ U.S. ____, 104 S.Ct. 1883, 1889-90, 80 L.Ed.2d 428 (1984). We accordingly make provision for certain relief during the interim.

III. ABSTENTION

[1, 2] We hold that the district court should have stayed its hand in this case, pending final determination of the issues

turning upon Puerto Rico law, as it is clear that completion of the remedial stage of *Colegio* v. *Schneider* "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially alter the nature of the problem." *Harrison* v. *NAACP*, 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959) (emphasis supplied); *Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959). Abstention is appropriate "where, as in this case, the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute." *Harris County Commissioners Court* v. *Moore*, 420 U.S. 77, 85, 95 S.Ct. 870, 876, 43 L.Ed.2d 32 (1975); *Meridian* v. *Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 641, 79 S.Ct. 455, 457, 3 L.Ed.2d 562 (1959) (per curiam).

The Supreme Court of Puerto Rico, in its April 5, 1982 opinion, while upholding the constitutionality of Puerto Rico's integrated bar, held that under the Constitution of Puerto Rico dissenting members of the bar were entitled to a pro rata refund of dues to the extent the Colegio engaged in ideological actions not related to the Colegio's statutory purposes. In so doing, the court adopted as a matter of Puerto Rico law a remedy devised for dissenting workers by the Supreme Court of the United States in closed shop labor cases. *Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). It ordered the Colegio to develop a plan to implement this concept. While citing to cases from the Supreme Court of the United States, the Puerto Rico court reflected its own authoritative interpretation of the Constitution of Puerto Rico, which, it determined, recognizes associational and free speech rights no less than those in the federal Constitution. In ordering this remedy, the Supreme Court of Puerto Rico acted not only under its power to construe Puerto Rico's constitution but

under its inherent judicial power to determine the grounds for admission to the bar. *See* note 3, *supra*. The latter power exceeds that of the Puerto Rico legislature in this special area, thus the court has unique latitude to fashion a direct solution without returning to the legislature.

The Supreme Court of Puerto Rico has yet to complete its remedial action. While the Colegio adopted a regulation in purported conformity with the court's opinion, the court has indicated that it will review that regulation. Although serious objections can be raised to the Colegio's proposed remedy, the Puerto Rico court has plenary power to reject and revise the Colegio's action if it is so inclined for reasons of law or policy. It could conceivably do so in such a way that plaintiffs will obtain all the relief to which they are entitled under federal constitutional standards.

To be sure, even if the Puerto Rico court were to insist upon a workable *Abood*-style remedy, and even if it were to rethink its position on refunds in light of the recent case of *Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks*, ____ U.S. at ____, 104 S.Ct. at 1889-90 (which rejected the adequacy of "the pure rebate approach"), plaintiffs could argue that the Colegio's penchant for ideological contention is so pervasive and unremitting — as compared with, say, the Wisconsin Bar as characterized in *Lathrop*[9] — that Puerto Rico can-

[9] Although we do not decide the issue here, it can be argued that *Railway Employee's Department* v. *Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), followed in *Lathrop*, and *Hanson's* progeny — *Street*, *Allen*, *Abood*, and now *Ellis*, *see* note 10 — are viable precedent in the bar association context only when certain factual predicates, existing in *Lathrop*, are met. In *Lathrop* the plurality expressly rejected plaintiff's characterization of the Wisconsin bar association as "partak[ing] of the character of a political party." 367 U.S. at 833, 81 S.Ct. at 1832. Any suggestion that it was "a sham organization deliberately designed to further a program of political action" was barred by the procedures adopted by the association to assure "substantial unanimity" among members and to recognize views of dissenters. *Id.* at 834, 81 S.Ct. at 1833. (Indeed, one commentator has suggested that the willingness of the plurality to uphold the constitutionality of the Wisconsin scheme depended upon these procedural safeguards. *See* T. Schneyer, The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin

not constitutionally force dissenters to join Alternatively, plaintiffs might contend that a more sweeping remedy than the *Abood* remedy is necessary here — for example, enforced separation of the ideological component of the Colegio from its "core" functions, with dissenters being compelled to join only the latter component.[10] The district court in its opinion indicated that it saw the present situation as factually distinguish-

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Case, 1983 A.B.F.Res.J. 1, 55-56.) These procedures, moreover, focused bar political debate on matters "of general professional interest." *Lathrop*, 367 U.S. at 834 n.9, 81 S.Ct. at 1833 n.9. The *Lathrop* plurality also noted there that "legislative activity [was] not the major activity of the State Bar," *id.* at 839, 81 S.Ct. at 1835; and that "the bulk of the State Bar activities serve the function . . . of elevating the educational and ethical standards of the Bar to the end of improving the quality of legal service available to the people of the state without reference to the political process." This was a "legitimate end of state policy" permitting compulsory dues even though the association "engaged in some legislative activity." *Id.* at 843, 81 S.Ct. at 1838. *See also In re Amendment to Integration Rule of the Florida Bar*, 439 So.2d 313 (Fla.Dist.Ct.App. 1983), and *Report of Committee to Review the State Bar*, 334 N.W.2d 544 (Wis.Ct.App. 1983) (focusing on similar procedural safeguards).

In the instant case, while the district court canvassed the range of the Colegio's ideological activities, it did not describe the Colegio's other pursuits or the proportion of resources devoted to them. We assume at this stage of the litigation that the Colegio, like the bar association examined in *Lathrop*, has a "multifaceted character, in fact as well as in conception." *Id.* at 842, 81 S.Ct. at 1837.

[10] To our knowledge, however, no court has held that compulsory bar dues may never be used to further *any* political, or perhaps more accurately, "legislative" purposes. *See, e.g., Arrow* v. *Dow*, 544 F.Supp. 458, 463 (D.N.M. 1982) (striking compulsory support for certain lobbying while "declin[ing] to hold categorically that the Bar is prohibited from spending bar dues for lobbying"); *Report of Committee to Review the State Bar*, 334 N.W.2d 544 (Wis. 1983) (accepting committee recommendation to impose rebate system, without deciding whether such system was constitutionally mandated); *see also Falk* v. *State Bar of Michigan*, 418 Mich. 270, 342 N.W.2d 504 (1983), 411 Mich. 63, 305 N.W.2d 201 (Mich. 1981) (failing to reach consensus on issue). In *Lathrop* Justices Harlan and Frankfurter approved the use of such dues to support "legislative activities" where the supervising state court had restricted these activities to "the more technical areas of the law into which no well-advised layman would venture without the assistance of counsel," 367 U.S. at 861, 864, 81 S.Ct. at 1849; their position, however, did not command a majority of the Court.

able. (It did not, however, expressly attempt to distinguish *Lathrop.)*

Nonetheless, while even provision of a remedy in complete compliance with *Abood* and its progeny would not necessarily signal the end of plaintiffs' federal case, it would surely transform it. As the Colegio points out, existing law to date upholds the concept of integrated bars, and the only dissenters' remedy yet addressed by the United States Supreme Court (although in a different context) is the reduction in dues discussed in *Abood*, and, most recently, in *Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks*, ____ U.S. at ____, 104 S.Ct. at 1889-90.[11] If such a remedy were truly afforded, the Colegio could argue (although we think it premature for us to indicate whether or not we would accept the argument, and do not do so here) that the federal Constitution was satisfied.

Conversely, of course, to the extent whatever remedy the Supreme Court of Puerto Rico approves falls short even of the standards established in *Abood* and *Ellis*, plaintiffs will have a different, more specific and more powerful federal constitutional claim.

Our point is simply that until the Supreme Court of Puerto Rico acts, or at least shows that no further action can be expected, the dimension of the constitutional issue for federal adjudication will remain unsettled. For that reason alone, there is good reason for the federal court to stay its hand while retaining jurisdiction. *Harrison* v. *NAACP*, 360 U.S. at 177, 79 S.Ct. at 1030.

[3] The argument for abstention is also greatly strengthened by several special factors. First, as noted, a state proceeding is already in being.

> Where there is an action pending in state court that will likely resolve the state-law questions underlying the fed-

[11] *Ellis* held that a "pure rebate approach is inadequate" under section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, given "acceptable alternatives" "such as advance reduction of dues and/or interest bearing escrow accounts. . . ." ____ U.S. at ____, 104 S.Ct. at 1889-90.

> eral claim, [the Supreme Court has] regularly ordered abstention. See *Askew* v. *Hargrave*, [401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971)]; *Albertson* v. *Millard*, 345 U.S. 242 [73 S.Ct. 600, 97 L.Ed. 983] (1953); *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 173 [62 S.Ct. 986, 988, 86 L.Ed. 1355] (1942); cf. *Meredith* v. *Winter Haven*, 320 U.S. 228, 236 [64 S.Ct. 7, 11 88 L.Ed. 9] (1943).

Harris County Commissioners Court v. *Moore*, 420 U.S. 77, 83, 95 S.Ct. 870, 874, 43 L.Ed.2d 32 (1975). Indeed, in the cases cited the state court proceeding typically started *after* the federal action and in one case at least, was initiated by parties unrelated to the claimant in the federal case. *Askew* v. *Hargrave*, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971). Of course, serious delays in the litigation may argue against abstention. *See Harris County Commissioners Court*, 420 U.S. at 84, 95 S.Ct. at 875. But here the Colegio argues that delays in the Commonwealth proceeding were tied to the progress of this action. We note, moreover, that plaintiffs have apparently refused to provide to the Puerto Rico tribunal meaningful comment on the Colegio's proposed remedy based upon the Commonwealth's Constitution. When asked for their recommendations on that matter, Schneider and Hector Ramos answered, "without accepting nor submitting to the jurisdiction of the Honorable Supreme Court," that since the court had rejected their arguments in adopting its opinion, "there is no reason nor justification in law to require that [they] once again formulate their commentaries and objections" as to the Colegio's proposal.

A second special factor supporting abstention is the unique role of the Supreme Court of Puerto Rico in a proceeding of this nature, a role which makes it especially desirable for the federal courts to allow it to act before they consider stepping in.

> [W]hen the state-law questions have concerned matters peculiarly within the province of local courts, see *Reitz* v. *Bozanich*, [397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970)]; *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 [91 S.Ct. 156, 27 L.Ed.2d 174] (1970); cf. *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 [79 S.Ct. 1070, 3 L.Ed.2d 1058] (1959), [the Supreme Court has] inclined towards abstention.

Harris County Commissioners Court, 420 U.S. at 84, 95 S.Ct. at 875. As already mentioned, the Supreme Court of Puerto Rico not only may exercise its usual judicial powers but, because of its inherent power over the bar, can also act outside the relevant statutes. Thus it is not limited, as a federal court is, merely to striking down unconstitutional statutory provisions. Rather, it can directly fashion relief, so as to rectify an otherwise unconstitutional provision relating to bar membership. Were the Supreme Court of Puerto Rico persuaded that the dissenters' remedy it previously suggested was no longer sufficient in light of *Ellis* or other considerations, it could take a different tack, even going so far as to order the Colegio to leave the taking of public positions on matters unrelated to the Colegio's core statutory purposes to a separate group having a purely voluntary membership.[12] In any case, because of its inherent powers, the Supreme Court of Puerto Rico could establish this or some other remedy without any need for legislative change, and is therefore uniquely situated to structure a workable remedy.

[4] Finally, the expertise, cooperation and goodwill of the Supreme Court of Puerto Rico will make much difference to the success of any remedy from whatever source over the long run. This fact alone suggests the need for restraint in these circumstances. Abstention is, after all, a

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[12] One commentator has suggested that a "better solution" than *Abood's* rebate scheme "might well be to require ideological activities unrelated to collective bargaining to be financed from voluntary contributions in the first place." L. Tribe, *American Constitutional Law*, § 12-4, at 589 n.5 (1978).

> well-established procedure . . . aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize interference a "scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts," *Mathews* v. *Rodgers*, 284 U.S. 521, 525 [52 S.Ct. 217, 219, 76 L.Ed. 447], as their "contribution . . . in furthering the harmonious relation between state and federal authority. . . ." *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971.

Harrison v. *NAACP*, 360 U.S. at 176, 79 S.Ct. 1030. Here we are concerned with the proper relationship between the federal and Commonwealth courts, "functioning as a harmonious whole." *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 173, 62 S.Ct. 986, 988, 86 L.Ed. 1355 (1942). Given the fact that the Supreme Court of Puerto Rico has demonstrated its awareness of the constitutional problem, we think the federal courts should be slow to come between it and the remedial steps it is contemplating. Thus while we can appreciate the concerns of the district court, we think this matter must be approached with deliberation and full respect for the role of the judiciary of the Commonwealth of Puerto Rico.

IV.

In the previous section we did not distinguish between the separate issues of the Colegio's dues and of its forensic and notarial stamps, although arguably these issues require different legal analyses and come to us in distinct postures for abstention.

The Colegio argues vigorously that the Supreme Court of Puerto Rico "explicitly dealt with the stamp challenges on the merits" in its April 5, 1982 opinion and has "specifically" in-

cluded "these items" in its guidelines for a remedy for dissenting members. It asserts, therefore, that the stamp issue, like the dues issue, is a matter of live controversy before the Commonwealth's highest court and thus appropriate for abstention. While we were not convinced that this was a proper characterization of the Puerto Rico court's opinion in *Colegio* v. *Schneider* at the time of our prior decision, *see* note 5, *supra*, we were not asked to, and did not consider, the propriety of *Pullman* abstention at that time, perhaps because the Justices of the Supreme Court of Puerto Rico were then before us as active litigants. Now, however, the Justices' posture in the case has changed to that of nominal parties; they have not participated in this appeal in any manner. We, therefore, think it appropriate that the Justices be given an opportunity, as a court, to clarify their position on the stamp issue.

Whether or not the stamp statutes have been addressed by the Commonwealth court, we consider these provisions to present precisely the sort of "unsettled question of state law" which abstention was designed to resolve. *Harris County Commissioners Court*, 420 U.S. at 83, 95 S.Ct. at 875; *Santasucci* v. *Gallen*, 607 F.2d 527 (1st Cir. 1979). While it appears likely that some remedy may be forthcoming for dissenters concerning the stamps, it is not certain whether the Supreme Court of Puerto Rico will reduce their cost for dissenters, bar the use of stamp sale proceeds altogether for ideological pursuits, or take some other position which will tend to moot or at least reshape the federal constitutional question.

If the Colegio's view of the Puerto Rico court's opinion and order is correct, however, we are confronted by the stark fact that the Colegio's proposed remedy is completely silent on the matter of forensic and notarial stamps, affording no relief for dissenters whatever. That silence was construed by the district court as evincing bad faith. Given the Colegio's present representations to us that dissenters are entitled to relief as a matter of Puerto Rico law and that the Supreme Court of Puerto Rico so held, we would expect the Colegio to maintain that position

in the future, and to offer an appropriate remedy proposal to the Puerto Rico court.

V.

[5, 6] While we consider this an appropriate case for abstention, this is not to say that the federal court is powerless, that plaintiffs' rights under the federal Constitution are to be forgotten, or that the district court should stay its hand forever. Abstention "does not ... involve the abdication of federal jurisdiction, but only the postponement of its exercise." *Harrison* v. *NAACP*, 360 U.S. at 177, 79 S.Ct. at 1030. The district court may proceed after the Supreme Court of Puerto Rico has finally determined what remedy to provide, or sooner in the unlikely event of some unusual delay. *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25, 31, 79 S.Ct. 1070, 1074, 3 L.Ed.2d 1058 (1959).

One aspect of plaintiffs' situation, however, calls for redress during the pendency of further proceedings. Under the Puerto Rico Supreme Court's current order, attorneys must pay the full Colegio dues in order to retain good standing at the Puerto Rico bar. Relief is limited to an eventual refund. But while a rebate of this nature found some support in earlier Supreme Court cases, *see Ellis*, ____ U.S. at ____, 104 S.Ct. at 1889-90, its adequacy has recently been rejected by the Court.

> [W]e hold that the pure rebate approach is inadequate.
>
> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. ...
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest bearing escrow accounts, that place only

> the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. . . .

Id. Given this clear statement by the Court, we think plaintiffs should not be required to wait before being afforded any reduction in their annual dues. As earlier indicated, we do not decide now whether dues-reduction *alone* is a satisfactory answer to plaintiffs' complaint; but at least it is clear that, *at a minimum*, dissenting attorneys may not be forced to subsidize ideological activity outside the ambit of activities for which membership may properly be compelled. This being so, plaintiffs should not be forced to pay full dues to the Colegio while this litigation proceeds.

[7, 8] A reasonable interim solution, fair to both sides, would be for plaintiffs who wish to practice to have to pay only 50 percent of their annual dues directly to the Colegio *pendente lite*, with the remaining 50 percent to be paid into an interest-bearing escrow account managed by a bank or other completely neutral entity. The escrow agreement should provide that these sums and the accumulated interest will eventually go to the Colegio and plaintiffs, in such amounts and proportions as the court directs pursuant to a final resolution of this litigation (meaning resolution at both the Commonwealth and federal levels). If the Supreme Court of Puerto Rico is willing to order and supervise such an immediate remedy (which would, of course, be only temporary, until the claims now in dispute are finally resolved both in the Supreme Court of Puerto Rico and, if necessary, the federal courts) we would encourage it to do so. If the Supreme Court of Puerto Rico does not itself order such an interim remedy within 60 days after issuance of our mandate, we direct the district court to do so.[13]

[13] To order interim temporary relief of this character is consistent with abstention, since during abstention a federal court may "protect the appel-

The judgment of the district court is vacated and the case remanded for proceedings not inconsistent herewith.

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lees while this case goes forward." *Harrison* v. *NAACP*, 360 U.S. at 179, 79 S.Ct. at 1031. *See also Babbitt* v. *United Farm Workers*, 442 U.S. 289, 312 n.18, 99 S.Ct. 2301, 2316 n.18, 60 L.Ed.2d 895 (1979); *Silverman* v. *Browning*, 359 F.Supp. 173 (D.Conn. 1972), *aff'd mem.*, 411 U.S. 941, 93 S.Ct. 1927, 36 L.Ed.2d 406 (1983). This court has previously authorized "preliminary injunctive relief during the period that the district court, retaining jurisdiction, awaits the state outcome" where "considerations of equity and fairness required." *Catrone* v. *Massachusetts State Racing Commission*, 535 F.2d 669, 672 (1st Cir. 1976). *See Hotel and Restaurant Employees and Bartenders International Union* v. *Danziger*, 709 F.2d 815, 832 (3d Cir. 1983); *New Jersey-Philadelphia Presbytery* v. *New Jersey State Board of Higher Education*, 654 F.2d 868, 885-86 (3d Cir. 1981); *Coley* v. *Clinton*, 635 F.2d 1364, 1379-80 (8th Cir. 1980). *See also* C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4243, at 473 (1978).

APPENDIX E

United States Court of Appeals
District of Puerto Rico

Civ. Nos. 82-1459, 82-1513, 82-1514,
82-1532 (TR).

Robert E. SCHNEIDER, Jr., et al.,
PLAINTIFFS,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO, et al.,
DEFENDANTS.

SEPT. 13, 1982.

Robert E. Schneider, Jr., Santurce, P.R., pro se and for plaintiffs.

Salvador Antonetti-Zequeira, Jay Garcia-Gregory, San Juan, P.R., Miriam Naveira de Rodon, Santurce, P.R., Jose Julian Alvarez Gonzalez, University of Puerto Rico, Rio Piedras, P.R., for Justices of Supreme Court.

Pedro A. del Valle Ferrer, Fed. Lit. Div., Dept. of Justice, San Juan, P.R., for Secretaries of Justice and Treasury.

Harry Anduze Montano, Santurce, P.R., for Colegio & Fundacion de Abogados.

Jorge F. Romany, San Juan, P.R., pro se.

Hector L. Marquez, Hato Rey, P.R., pro se.

Hector Urgell Cuebas, San Juan, P.R., pro se.

Jorge Souss Shidrewa, pro se.

Oreste V. Ramos Diaz, Santurce, P.R., pro se.

DECISION AND ORDER

TORRUELLA, District Judge.

The original action in this case, Civil No. 82-1459, is related to issues which give rise to disbarment proceedings initiated in the Supreme Court of Puerto Rico (hereinafter called the "Puerto Rico Court") against Plaintiffs Robert E. Schneider, Jr. and Hector R. Ramos Diaz (hereinafter called "Plaintiffs Schneider and Ramos"). Those proceedings were commenced on November 21, 1977 by Codefendant Colegio de Abogados de Puerto Rico (hereinafter called the "Colegio") for the non-payment of the annual dues owed to the Colegio.[1] At the time of the filing of said proceedings Plaintiff Schneider had refused to pay dues since 1974 and Plaintiff Ramos since 1976. After a series of motions, incidents and proceedings, the Puerto Rico Court rendered its decision on the merits on April 5, 1982 and ordered Plaintiffs Schneider-Ramos to pay the pending Colegio dues or face disbarment. (See *Colegio de Abogados de Puerto Rico* v. *Schneider, et al.*, 112 D.P.R. ____ (1982), 82 JTS 51). Upon their failure to pay the dues owed, the Puerto Rico Court ordered their disbarment on June 3, 1982.

On June 9, 1982, Plaintiffs Schneider and Ramos filed their present action, purportedly challenging the constitutional validity of Law No. 43 and a companion statute, Law No. 99 of June 29, 1956 (4 LPRA 1001 *et seq.)*, alleging violation of their civil rights pursuant to 42 U.S.C. § 1983 *et seq.* and of

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[1] The Colegio is Puerto Rico's state-wide integrated bar association created pursuant to Law No. 43 of May 14, 1932 (hereinafter Law 43) (4 LPRA 771 *et seq.)*. Codefendant Fundacion Colegio de Abogados, is an organization adjunct to the Colegio which for purposes of these proceedings need not be separately considered.

Section 3 of Law No. 43 (4 LPRA 774) provides specifically that "no person who is not a member [of the Colegio] shall practice law in [the Commonwealth of Puerto Rico]. Section 9 of said Law (4 LPRA 780), as amended by Law No. 73 of June 21, 1962, provides that the Colegio is "authorized to fix the annual dues payable by its members." Section 10 further provides that "[a]ny member [of the Colegio] who fails to pay his dues, although otherwise qualified as a member . . . shall be suspended as such member, but may be reinstated on payment of his debt on this account."

the First, Fifth and Fourteenth Amendments to the Constitution of the United States.[2]

The complaint seeks declaratory and injunctive relief as well as damages against the Defendants, whom we will classify for purposes of this decision as follows: (1) the Colegio, (2) Carmen Ana Culpeper, Secretary of the Treasury for the Commonwealth of Puerto Rico (hereinafter called the "Secretary of the Treasury") and Hector Reichard de Cardona, Secretary of Justice of the Commonwealth of Puerto Rico (hereinafter called the "Secretary of Justice"), and (3) Jose Trias Monge, Carlos V. Davila, Hiram Torres Rigual, Jorge Diaz Cruz, Carlos Irizarry Yunque and Antonio S. Negron, the Chief Justice and Associate Justices, respectively, of the Puerto Rico Court (hereinafter referred to collectively as the "Justices").[3]

The essence of the allegations contained in Plaintiffs Schneider and Ramos' lengthy complaint can be summarized as follows:

(1) Compulsory membership in the Colegio as required by Law No. 43, and as administered by the Colegio, does not have a reasonable relationship to any permissible legislative objective. The statute is overbroad and "chills" the freedom of expression and association rights of those that dissent from the Colegio's ideological and partisan activities yet are compelled to belong thereto in order to engage in the practice of law. It is claimed that the problem is compounded in forcing these dissenters to financially support these activities by the payment of dues and other monetary contributions required by law.[4] Thus

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[2] Jurisdiction is alleged pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4), 2201 and 2202.

[3] Subsequent to the filing of the original complaint, Francisco Rebollo became a member of the Puerto Rico Court. Plaintiffs have amended their complaints to include Justice Rebollo as a nominal party defendant for purposes of the requested declaratory and injunctive relief only.

[4] The first pleading filed in any action in the Commonwealth's Courts requires the attorney to adhere a $1.00 "forensic" stamp, the proceeds of which revert to the Colegio, 4 LPRA § 783. Failure to comply with this requirement is grounds for dismissal of the action. Cf. *De Soto* v. *Clinica Industrial*, 70 P.R.R. 811 (1950).

Law 43 violates the freedom of expression and association clause of the First and Fourteenth Amendments. Furthermore, because it raises an irrebuttable presumption to the effect that those who do not pay dues to the Colegio are not qualified to practice law, it is alleged that it also violates the due process clause of the Fourteenth Amendment;

(2) It is claimed that the proceedings before the Puerto Rico Court to seek their disbarment did not grant Plaintiffs Schneider and Ramos a full, fair and meaningful opportunity to be heard; and

(3) It is alleged that there existed a conspiracy between the Colegio and the Justices to deprive those plaintiffs of their right to practice law and of their various civil rights.

Together with the complaint, Plaintiffs Schneider and Ramos filed a Motion for Preliminary Injunction. An order to show cause issued setting the matter for a hearing on June 21, 1982. At the hearing, which resulted in the denial of the preliminary injunction sought, the Justices filed the Motion to Dismiss and/or Motion For Summary Judgment which is the principal subject matter of the present decision.

At the hearing also, three other individual Plaintiffs, Jorge F. Romany (Civil Number 82-1513), Jorge Sous Schidrewa (Civil Number 82-1514), and Oreste V. Ramos Diaz (Civil Number 82-1532), hereinafter referred to as Plaintiffs Romany, Sous and Oreste Ramos, respectively filed complaints similar to the one filed by Plaintiffs Schneider-Ramos against the Justices, the Colegio and the Secretaries of Justice

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In the practice of notarial law in Puerto Rico, which as in other civil law jurisdictions is limited to attorneys, the law also requires the notary-attorney to cancel a special notarial stamp on each original deed and on every certified copy of the same, the proceeds of which also go to the Colegio. See 4 LPRA § 783. Failure to comply with this requirement renders the notary-attorney subject to disciplinary action before the Supreme Court, and prevents the certified copy of the deed from being registered in the Registry of Property. Cf. *Rosario* v. *Registrador*, 65 DPR 464 (1945).

All the stamps referred to herein are sold by the Treasury Department of the Commonwealth of Puerto Rico, and the monies collected by personnel of said Department are remitted to the Colegio.

and Treasury. However, these new complaints contain some important differences from the Schneider-Ramos allegations. Plaintiffs Romany, Sous and Oreste Ramos do not allege that they have been disbarred. They in fact have been paying their Colegio dues. They claim, however, the right to declaratory and injunctive relief from continued mandatory dues payment and Colegio membership by reason of the alleged unconstitutionality of Law No. 43, as per allegations similar to the Schneider-Ramos complaint, as previously summarized. They also make a claim for damages. Plaintiff Oreste Ramos' complaint also alleges that he attempted without success to pay the 1982 Colegio dues, with a limit as to the ideological activities for which these dues could be used, but that this procedure was rejected by the Colegio. Lastly, Plaintiffs Romany, Sous and Oreste Ramos make no conspiracy allegations. These cases were consolidated with the original Schneider-Ramos suit (Civil No. 82-1459).

The issues raised by Defendant Justices in the referred Motions[5] are as follows:

(1) That the complaints fail to state a claim upon which relief can be granted;

(2) That this Court lacks jurisdiction in that this is an attempt to review a judgment of the Puerto Rico Court, which may only be done by the Supreme Court of the United States;

(3) That the actions are barred by res judicata-collateral estoppel principles;[6]

(4) That this Court has been asked to intervene in an ongoing judicial proceeding in violation of *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 639 (1971);

(5) That the Justices are protected by judicial immunity;

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[5] Although the original Motion referred to only Plaintiffs Schneider-Ramos, they have been made extensive to the other Plaintiffs as well.

[6] In this respect, it is claimed that any attempt by Plaintiffs Schneider-Ramos to reserve federal issues pursuant to *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), is invalid.

(6) That these actions seek to enjoin the collection of taxes, in violation of the Butler Act (48 U.S.C. § 872).

The Colegio filed a Motion to Dismiss similar to the Justices. The Secretary of Justice and Treasury also filed a Motion to Dismiss, but limited to the issues raised by the Tax Injunction Act and the Butler Act.

The starting point to a discussion of the issues raised in the present cases is an understanding of the Puerto Rico Court's decision in *Colegio* v. *Schneider et al., supra.*

I. THE PUERTO RICO COURT'S DECISION

The opinion in *Colegio* v. *Schneider, et al., supra,*[7] is as revealing for what it fails to decide as for what it does decide.

At the outset, the Puerto Rico Court clearly establishes the premises upon which it renders the opinion. To begin with, it indicates that its decision concerns only those attorneys who, out of an original total of ninety-nine lawyers against whom a complaint was filed by the Colegio, still refuse to pay the dues owed. In this respect it specifically mentions only Plaintiffs Schneider and Ramos, whom the Puerto Rico Court indicates, contend that the order to show cause issued by that Court concerning their possible separation from the practice of law for failure to pay the Colegio dues, "is at variance with the *Constitution of the Commonwealth of Puerto Rico*" (emphasis supplied). *Id.* at p. 1. In this respect the Court reduces their contentions to four points, which are:

> "... 1st, that the Legislature lacks the power to regulate the practice of law, inasmuch as this power is within the province of the Supreme Court of Puerto Rico; 2nd. that they cannot be forced to become members of the Bar; 3rd. that the provisions of Act No. 43 of May 14,

[7] The citations from this decision are from the official translation of the decision which is found as Exhibit 10 of the Justices' Appendix of Exhibits in support of the Petition for Writ of Mandamus or Prohibition.

> 1932 (4 LPRA 771 *et seq.)* establishing the payment of dues, is void because it violates the freedom of speech and association; and 4th, that the amounts collected by virtue of the dues required as a condition to practice the legal profession, as well as those received from the compulsory purchase of notarial and bar stamps, are impermissibly used for purposes foreign to the Bar's duties." *(Id.* at pp. 1-2).

The discussion of the first issue contains both matters of direct and of tangential interest to the present case. In it the Puerto Rico Court considers the historical background of the Colegio, founded originally by Royal Decree in 1840 and "suppressed by . . . the United States Military Government on the Island", which established in its place the Bar Association of Puerto Rico, ". . . a colorless entity, which was voluntary and which led a precarious life until the present [Colegio] was created by Act No. 43. . . ." *Id.* at p. 3. It confirms that the Colegio's funds come mainly from the annual dues and from the proceeds of the aforementioned "forensic" and notarial stamps. *Id.* at p. 4. In affirming the inherent right of the Puerto Rico Court to establish compulsory membership in the Colegio, the decision holds that Law No. 43 does not infringe upon that state-created right because it "is only advisory, not binding." *Id.* at p. 5. Lastly, it holds that Law No. 43 meets a legitimate public purpose of "reviv[ing] one of our most ancient and respected institutions, which has an unquestionable value not only for the benefit of the strict interest of a class, but also for the good operation of justice in our country and *the social advancement of the community.*" (Emphasis supplied). *Id.* at p. 5.

The decision next upholds the constitutionality of compulsory membership pursuant to Article II, Section 6 of the *Constitution of Puerto Rico*, and holds that certain cases decided prior to its approval in 1952,[8] to the effect that both

[8] *In re Bosch*, 65 P.R.R. 232, 235 (1945), *Bar Ass'n* v. *Fajardo*, 51 P.R.R. 512 (1937).

Colegio membership and the payment of dues[9] thereto are a prerequisite to the practice of law in Puerto Rico, are still valid law. *Id.* at p. 8.

The Puerto Rico Court next considers the question of whether or not a member has the right to object to the use given to the funds he personally contributes. Confessing to "the record [being] short of information with regard to this point" *(Id.* at p. 9), the Puerto Rico Court nevertheless deems it advisable to state the general principles governing the *Colegio's* right to freedom of speech. In doing so the decision looks to what it believes to be a civil law tradition, wherein bar associations were not "mere guilds immersed in the defense of their class interests" *Id.* at p. 9. Thus the Court finds that "in France, whose experience echoe[s] . . . [that of] many other countries, the Bar's role was, from time immemorial, a primarily political one . . . [where] [t]he Bar took active part in the country's principal political movements, both before and after the Revolution." *Id.* It considers that a similar situation existed in the Spanish Bar, from whom, earlier in its opinion, the Puerto Rico Court finds the sources of the Colegio's lineage. *Id.* at p. 23. Thus, coming to the Colegio, the Puerto Rico Court holds that "it may engage in any activity authorized by the Legislature of Puerto Rico or by [that] Court, provided such activity is rationally linked to the purposes expressed in Act No. 43" or in an order issued by the Puerto Rico Court. *Id.* at p. 10. Furthermore, the decision holds that the Colegio enjoys "ample freedom of speech under the provisions of art. II, Sec. 4 of the *Constitution [of Puerto Rico].*" (emphasis supplied). *Id.* In exercising this freedom of speech, the Colegio, in representation of the majority of its members, can-

[9] Although there is a possible distinction between funds received from annual dues and those received from the proceeds of the stamps in question, the opinion deals almost exclusively with the dues payments. For example, at the end of the discussion of this particular issue, the decision states: "Up to this point we have analyzed the validity of compulsory membership or of compulsory payment of dues and cancellation of stamps." Yet the text of the discussion fails to mention anything but the dues issue.

not be curtailed by dissident members even if they enjoy their own freedom of speech: "In the case of Puerto Rico, the [Colegio] need not be a quiet and blushing entity, afraid to use the voice granted to it by the very pluralistic purpose it should serve, although such is not its only *raison d'etre*." See *Id.* at p. 10.

The decision thus reaches a discussion of the Colegio's use of compulsory "contributions."[10] The Puerto Rico Court first concludes that the record fails to establish the specific activities objected to by Schneider and Ramos, nor the part of their contributions which are devoted to said activities. This, however, does not deter the Puerto Rico Court from "going into the constitutional problem." *Id.* at p. 11. Citing from various federal cases, among them *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961); *Brotherhood of Railway & Steamship Clerks* v. *Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956) and *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the opinion holds that "the freedom of speech clause contained in Art. II, Sec. 4 of the *Constitution of Puerto Rico* is not narrower than that given by the United States Supreme Court to the First Amendment in this context." (emphasis supplied). *Id.* at p. 14. Thus, not only are compulsory membership and *dues* constitutional, but "the [Colegio] may constitutionally pronounce itself on ideological matters. On the other hand, lawyers who dissent from such pronouncements . . . enjoy, under the *Constitution of Puerto Rico*, the right to raise objection to the use of their contributions or of part thereof for ideological activities they do disapprove" (emphasis supplied). *Id.*

The remainder of the opinion deals with the provision of an *Abood*-like remedy for the dissenters, which remedy will be

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[10] Although the term "contributions" seems to imply both the dues and the monies collected from stamps, again as pointed out in footnote 9 herein, the opinion only discusses *dues*.

formulated by the Colegio. The Colegio is required to devise a method whereby the contributions of a dissenting member shall not be used for ideological purposes.[11] This remedy must be effectuated not later than the date set for collecting the next annual dues[12] and after giving members an opportunity to express themselves on the matter. The method formulated requires all objections to be made by the dissenters at the time the dues are paid.[13] The Colegio must follow the principles of *Street*, *Allen* and *Abood*, and must create a panel of "renowned attorneys who, among other functions[14] [will] pass on, subject to review by [the Puerto Rico] Court, [1] the classification of the activities [of the Colegio], [2] the proportion between the ordinary activities and the ideological ones, [3] the validity of the objections [of] a member . . ., and [4] over any other controversy arising from the remedy and its application." *Id.* at p. 16. Dissenters must pay their dues to the Colegio until the remedy is implemented, and the Colegio is required to deposit in a separate account "an amount equivalent to the proportion between the sums destined to ideological purposes -- as the term may be temporarily understood by the Board of Governors — and the total expenses of the [Colegio]." *Id.* at p. 17.

In summary, as we understand *Colegio de Abogados* v. *Schneider*, *supra*, it stands for the following propositions:

(1) The only respondent parties which the Puerto Rico Court understood to have litigated on the merits were Plaintiffs Schneider and Ramos;

(2) The decision holds that Law No. 43 on its face is valid;

(3) The decision holds that in the administration of Law No. 43, the Colegio can engage in ideological activities;

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[11] Thus the Colegio polices itself.

[12] Which is January 1, 1983.

[13] This apparently means that lawyers must decide beforehand whether they will be year-long dissenters, without knowing, at the time the choice is made, the nature of the activities to which they are objecting.

[14] The decision makes no reference to any other functions for this panel.

(4) The decision holds that notwithstanding these ideological activities, Schneider and Ramos must belong to the Colegio and must pay annual dues and attach the "forensic" and notarial stamps previously alluded to, as a condition to practicing law in Puerto Rico. As to the *dues only*, a remedy of indeterminate future success is provided by the Puerto Rico Court, to be administered principally by the Colegio and a committee named by the Colegio from among its membership. Furthermore, as structured by the remedy, a large share of the burden of the mechanics of objecting to the use of the membership funds is placed on the dissenting lawyers; and lastly

(5) The decision is grounded *solely* on Puerto Rican Constitutional and Statutory law.

Put in the inverse, in the *Schneider* case:

(1) The Puerto Rico Court studiously avoids deciding any issue on *Federal* constitutional or statutory grounds;

(2) Neither Plaintiffs Sous nor Oreste Ramos were in any manner involved as parties or otherwise. In the case of Plaintiff Romany, although the subject of a complaint for nonpayment, his payment at an early stage of the proceedings impeded his participation in the merits of the case;[15]

(3) The use of monies collected from dissidents through "forensic" and notarial stamps is allowed for the ideological activities of the Colegio, without restriction; and

(4) The Puerto Rico Court implicitly recognizes that the Colegio has engaged in ideological activities during the past period for which the Schneider-Ramos dues are claimed, yet orders them to pay dues for said periods of time.

With this background, we proceed to discuss the merits of the pending matters.

II. ALLEGED FAILURE TO STATE A CLAIM

[1] It should be noted that in considering a motion to dismiss for failure to state a claim for relief, all of the allegations

[15] See pages 2-3 of Exhibit 1 attached to the Justice's Motion to Dismiss and/or for Summary Judgment.

of the complaint should be construed in the light most favorable to the pleader, and should be accepted as true. *Jenkins* v. *McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969); *United States* v. *Mississippi*, 380 U.S. 128, 143, 85 S.Ct. 808, 816, 13 L.Ed.2d 717 (1965); *Hochman* v. *Board of Education*, 534 F.2d 1094 (C.A. 3, 1976); *Dacey* v. *New York County Lawyers Ass'n.*, 423 F.2d 188 (C.A. 2), *cert. den.*, 398 U.S. 929, 90 S.Ct. 1819, 26 L.Ed.2d 91 (1969), *Robinson* v. *Stanley Home Products, Inc.*, 272 F.2d 601, 602 (C.A. 1, 1959). The pleadings should be read as a whole and viewed broadly and liberally, in conformity with the mandate of F.R.C.P. 8(f). Furthermore, reasonable factual inferences should be drawn to aid the pleader, and ambiguities resolved in his favor. *Quinones* v. *United States*, 492 F.2d 1269, 1273 (C.A. 3, 1974); *Gray* v. *Occidental Life Ins. Co.*, 387 F.2d 935 (C.A. 3, 1968), *cert. den.*, 391 U.S. 926, 88 S.Ct. 1825, 20 L.Ed.2d 665 (1968).

We thus explore Defendants' first contention.

a. *Non-Conspiracy Allegations*

[2] Leaving aside for the moment the conspiracy allegations contained in Paragraphs 57 through 60 of the Schneider-Ramos complaint, as well as other issues presently to be discussed, we cannot say that there is a failure to state claims which are cognizable under *Federal* substantive law.[16] See *Abood* v. *Detroit Board of Education*, *supra*; *Arrow* v. *Dow*, 636 F.2d 287 (C.A. 10, 1980). Although hardly models of clarity, a fair reading of the complaints shows that Plaintiffs allege sufficient facts from which we can conclude that they

[16] See 42 U.S.C. § 1983: "Every person who, under color of any statute ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action by law, suit in equity, or other proper proceeding for redress."

protest their being mandatorily required to belong to an organization which is allegedly used for ideological and partisan activities, and that they further protest the use for those purposes of the mandatory dues and stamp funds collected by the Colegio.

In *Arrow* v. *Dow*, *supra*, an action claiming deprivation of civil rights in violation of 42 U.S.C. § 1983 was filed by lawyers and members of the integrated State Bar of New Mexico, which is created pursuant to rules adopted by the Supreme Court of New Mexico. Those rules require all lawyers in New Mexico to be members of the state bar and to pay an annual license fee. Plaintiffs therein sued the Board of Bar Commissioners and its members claiming that the Board had hired a legislative lobbyist to influence the state legislature "on issues of public policy." *Id.* at p. 288. They claimed that "'[s]aid actions are of an economic and political nature of which Plaintiffs do not approve, in which they have no voice, and which are not legitimate functions of an integrated bar.'" The complaint went on to allege that these "'actions in combination have forced Plaintiffs into adopting and supporting an ideological conformity with which they disagree.'" Defendants moved to dismiss on the grounds that the District Court lacked subject-matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted.

The Court of Appeals rejected both arguments stating that:

> "The complaint adequately alleges that the Board, acting under the color of state law, deprived plaintiffs of rights secured under the First, Fifth, and Fourteenth Amendments to the United States Constitution. The complaint attacks the administration of the rules governing all lawyers rather than action relating to a single lawyer. . . . The complaint is sufficient without charging the specific activities or the specific ideologies to which plaintiffs object." (citations omitted). *Id.* at 289.

We find the present allegations indistinguishable from those in *Arrow* v. *Dow*, *supra*. See also *Abood* v. *Detroit Board of Education*, *supra*, 431 U.S. at page 213, 241, 97 S.Ct. at page 1788, 1802. The factual allegations in the complaints, challenging the use of mandatory Colegio membership and financial contributions for ideological purposes, state a cause of action under 42 U.S.C. § 1983.

Even assuming the *facial* validity of Law No. 43 pursuant to the plurality opinion in *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961), neither that case nor any other with which we are familiar permits the inference that an integrated bar can be used to compel financial contributions for ideological purposes.

In *Railway Employes' Dept.* v. *Hanson*, *supra*, and *Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1960), the Supreme Court held that mandatory dues used to finance collective bargaining activities in a union shop did not violate the members' rights under the First Amendment. Relying on its decisions in *Street* and *Hanson*, a plurality of the Supreme Court held in *Lathrop* that compelled membership in a state bar and exaction of compulsory dues to finance the bar did not deprive plaintiffs of their rights to freedom of association. But the *Lathrop* court specifically declined on the basis of an inadequate record, to decide whether the use of bar fees to support legislation to which the lawyers were "ideologically opposed" deprived them of their rights to free speech, *supra*, 367 U.S. at 843-848, 81 S.Ct. at 1838-1840. This issue, in the context of a labor union, was squarely presented to the Supreme Court in *Abood*.

In that case, plaintiffs, who were state employees, claimed that portions of a mandatory employment service charge levied upon nonunion members (equal to union membership fees) were being used to support ideological and political causes that they did not wish to support. The Court concluded that this was a violation of the First Amendment. The Court states:

"One of the principles underlying the Court's decision in *Buckley* v. *Valeo*, [424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659] . . . was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. . . .

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. . . . And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

> 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'
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> . . .

These principles prohibit a State from compelling . . . any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." (Citations omitted). 431 U.S. at 234-235, 97 S.Ct. at 1799.

In the most recent *Arrow* v. *Dow*, 544 F.Supp. 458 (D.C. N.Mex. 1982) the District Court, relying on *Abood*, held that said decision prohibited the use of mandatory bar dues to finance the lobbying activities of the New Mexico Bar Association because such actions required the support of ideological activities by dissidents, thus violating their First and Fourteenth Amendment rights.

We do not decide the merits of the non-conspiracy allegations at this time. "All that we decide is that the general allega-

tions in the complaints, if proved, establish a cause of action under the First and Fourteenth Amendments." *Abood*, *supra*, 431 U.S. at 237, 97 S.Ct. at 1800. Cf. *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978); *Wooley* v. *Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976).

b. *The Conspiracy Allegations in the Schneider-Ramos Complaint*

In the Motion to Dismiss of the Justices it is claimed that "Paragraphs 57 through 60 [of the Schneider-Ramos complaint] pretend, in the most irresponsible way possible, to allege on 'information and belief' an ongoing 'conspiracy' between Defendants Colegio and Justices. Positively no facts, whether specific or otherwise, are alleged in the complaint." Plaintiffs Schneider and Ramos contend that "[t]he allegations of conspiracy are based on information and belief and all refer to the general allegations contained in paragraphs 47 through 53, inclusive, of the complaint and all, naturally, depend on discovery for the development of the necessary factual elements for the claim."

[3] We start with the proposition "that complaints cannot survive a motion to dismiss if they contain conclusionary allegations of conspiracy but do not support their claims with reference to material facts." *Slotnick* v. *Staviskey*, 560 F.2d 31, 33 (C.A. 1, 1977), *cert. den.*, 434 U.S. 1077, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1978); *Slotnick* v. *Garfinkle*, 632 F.2d 163, 165-166 (C.A. 1, 1980); *Dunn* v. *Gazzola*, 216 F.2d 709, 711 (C.A. 1, 1954); *Kadar Corp.* v. *Milbury*, 549 F.2d 230 (CA.A. 1, 1977).

We must look to the complaint to determine whether this test has been met.

In Paragraph 57, Plaintiffs charge that the "Justices and the Colegio, have acted and continue to act, individually and/or

collectively, and on information and belief, have entered into a conspiracy, and continue to conspire, to injure and harm plaintiffs by depriving them of their license and/or right to practice law in Puerto Rico." Paragraph 60 further alleges that they "continue to conspire, to injure and harm plaintiff Robert E. Schneider, Jr. by continued and public harassment, censure, sanction, rebuke and criticism and by denying to said plaintiff a fair and impartial forum for the consideration and resolution of petitions and pleadings filed before the Supreme Court by said plaintiff in this and other cases."

We then turn to Paragraph 47 through 53, which deal with the allegations that a "full, fair and meaningful opportunity to be heard", and due process, were denied to Plaintiffs Schneider-Ramos by the Puerto Rico Court and its Special Examiner. Paragraph 48 lists actions by Defendants which they allege support these conclusions. Succinctly stated, Plaintiffs Schneider-Ramos allege a course of conduct by Defendant Justices and the Colegio. We paraphrase our understanding of the main contentions as follows:

(1) The failure of Colegio on numerous occasions to notify to Schneider-Ramos various matters related to the charges, including the complaint, pleadings, exhibits and briefs. Some of these deficiencies were later corrected by order of the Puerto Rico Court;

(2) The refusal of the Puerto Rico Court to designate a Special Examiner to hear and admit evidence, a situation which the Puerto Rico Court later, *motu propio*, corrected after a hearing before the Court was requested pursuant to its rules. This later hearing was never held, nor was the request for said hearing ever ruled upon;

(3) The denial by the Puerto Rico Court of requests for information from the Colegio for the purpose of identifying activities and expenditures of an ideological nature, a situation later partially rectified by the Puerto Rico Court in the sense that the Examiner was directed to order the Colegio to produce *Abood* information, but this was never done despite Plaintiffs' efforts with the Puerto Rico Court and Examiner.

(4) Matters related to the failure by the Examiner to grant a "meaningful" hearing, among which are: (a) that the hearing was held on December 5, 1978 and recessed at noontime, yet the Examiner filed his report at 3:03 p.m. of that same day, but dated December 4, 1978: (b) that the said Report failed to discuss any of the evidence presented by Schneider-Ramos at the December 5th hearing, including 19 exhibits of documentary evidence, one of which consisted of the 12 annual meeting programs, nor the oral evidence presented by Schneider-Ramos; and (c) that the Puerto Rico Court never took any action on Plaintiffs Schneider-Ramos' objections to the Examiner's report; and

(5) That all of the Justices are active members of the Colegio, that a majority of them have been on its governing board or otherwise participated in its affairs and activities, and that one of the Justices is the brother of one of the Colegio's lawyers, who is also a candidate for the office of President of the Colegio.

[4] To establish a cause of action based on conspiracy, a plaintiff must allege and show that the defendant agreed to commit an illegal act with another person. *Crowe* v. *Lucas*, 595 F.2d 985 (C.A. 5, 1979). Although conspiracies are rarely proven by direct evidence or by *vive voce* admissions, thus often requiring the use of circumstantial evidence, the complaint must at least allege overt acts which are related to the formation or furtherance of a conspiracy. *Rosaly* v. *Ignacio*, 593 F.2d 145, 152 (C.A. 1, 1979). Such a claim requires "at least minimum factual support of the existence of a conspiracy." *Francis-Sobel* v. *Univ. of Maine*, 597 F.2d 15, 17 (C.A. 1, 1979). The allegations must allow at least an inference from the circumstances that the defendants had a meeting of the minds and thus reached an understanding to bring about the conspiracy's objectives. *Hampton* v. *Hanrahan*, 600 F.2d 600, 620-623 (C.A. 7, 1979), *cert. granted in part, reversed on other grounds*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980) (per curiam).

[5] Even viewing these allegations in the light most favorable to Plaintiffs Schneider-Ramos pursuant to the standards previously indicated, we cannot conclude that their complaint passes procedural muster. This Court "need not conjure up unpleaded facts to support . . . conclusionary suggestions." *Slotnick* v. *Staviskey*, *supra* at p. 33. There is a clear distinction between allegations to the effect that a litigant was denied due process or a meaningful hearing vis-a-vis allegations that such actions are the result of a conspiracy. It *may* be that Plaintiffs Schneider-Ramos have alleged facts to support the lack of due process or of a meaningful hearing.[17] It is another thing to say that they have met the initial burden of alleging *facts* to the effect that this situation resulted from a *conspiracy*. Cf. *Slotnick* v. *Staviskey*, *supra*, at p. 34. See also *Rosaly* v. *Ignacio*, *supra*; *Francis-Sobel* v. *Univ. of Maine*, *supra*; *Henzel* v. *Gerstein*, 608 F.2d 654 (C.A. 5, 1979); *Mosher* v. *Saalfeld*, 589 F.2d 438 (C.A. 9, 1978) (per curiam).

The conspiracy allegations from Defendant Justices and the Colegio are thus DISMISSED.

c. *The Immunity Issues*

Because the immunity issues raised by the Justices and the Colegio raise issues related to whether this Court can grant any relief to Plaintiffs in the nonconspiracy allegations, it is appropriate that they be addressed at this time. Plaintiffs seek declaratory, injunctive, and damage remedies from both the Justices and the Colegio.

(1) *From Damages*

(6, 7] It is clear that judges are immune from liability for damages for acts committed within their judicial jurisdiction notwithstanding that the claim for damages is brought under 42 U.S.C. § 1983. *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213,

[17] That is an issue to be decided separately later in the opinion.

18 L.Ed.2d 288 (1967); *Stump* v. *Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). There is no question in our mind but that the actions challenged vis-a-vis the Justices, whether as regards the disbarment proceedings of Plaintiffs Schneider and Ramos, or as related to their power to regulate the bar and administer Law No. 43 and related legislation, are judicial and quasi-judicial in nature thus immunizing the Justices from liability for damages. Therefore, all claims for damages against the Justices must be DISMISSED.

[8] The damage claims against Colegio must be considered in a bifurcated manner. Colegio alleges that it is entitled to prosecutorial immunity pursuant to *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). That case extended to § 1983 actions the common law doctrine of absolute immunity from damages for "initiating . . . and . . . presenting the State's case." *Id.* at 424 U.S. at 431, 96 S.Ct. at 995. It appears evident that in filing charges against Schneider-Ramos in the Puerto Rico Court, the Colegio was acting in a prosecutorial capacity pursuant to the requirements of Section 2(g) of Law No. 43, 4 LPRA 773(g). Thus, the Colegio is immune from any liability for damages by reason of its actions in initiating and prosecuting Plaintiffs Schneider and Ramos' disbarment before the Puerto Rico Court. Any such claims for damages are DISMISSED.

[9] Of course the damage claims against Colegio are not limited to their prosecutorial activities. Both as to Plaintiffs Schneider and Ramos, as well as to Plaintiffs Romany, Sous and Oreste Ramos, there are damage claims based on the use to which the Colegio has put the funds received from Plaintiffs' dues and from the notarial and "forensic" stamps. Such activities of the Colegio are obviously not within its prosecutorial duties as contemplated in *Imbler* v. *Pachtman*, *supra*. Particularly after the decision in *Abood*, we can perceive of no reason why those damage claims should be dismissed, but only

with respect to the use of funds *after* the *Colegio* v. *Schneider* judgment. We, of course, intimate no opinion as to whether any damages can in fact be proven.

(2) *From Declaratory and Injunctive Relief*

[10] The Justices also claim judicial immunity from subjection to declaratory and/or injunctive relief.[18] For the sake of attempted clarity, this issue, although related in *this* case to other questions still to be discussed in this opinion,[19] will be considered separately at this time.

Interestingly enough both the Justices, who claim such immunity, and Plaintiffs, who oppose such claim, rely on *Supreme Court of Virginia* v. *Consumers Union*, *supra*, as supporting their respective positions.

In that case, which was filed pursuant to 42 U.S.C. § 1983, the Supreme Court of Virginia, the Virginia State Bar and the Chief Justice of the Virginia Court[20] were sued in federal court by a consumer group which requested a declaratory judgment and injunctive relief, claiming the invalidity of a provision of the State Bar Code promulgated by the Virginia Court as being contrary to the First and Fourteenth Amendments.

The Virginia Court claimed it had inherent authority to regulate and discipline attorneys, as well as statutory authority.[21] It also had ruled that it had authority to promulgate and amend rules prescribing a code of ethics governing the professional conduct of lawyers.[22] Violations of these rules were adjudicated in the last instance before the Virginia Court,

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[18] The Colegio, of course, makes no such claim. See *Supreme Court of Virginia* v. *Consumers Union*, *supra*, 446 U.S. at pp. 736-737, 100 S.Ct. at pp. 1976-1977; *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[19] Namely the *Rooker* and res-judicata-collateral estoppel allegations.

[20] And other defendants not relevant to the present issues.

[21] As does the Puerto Rico Court. See *Colegio* v. *Schneider*, *supra*, at p. 5.

[22] Also the Puerto Rico Court. 4 L.P.R.A. 773(f).

such actions being instituted either by the Virginia State Bar or at the behest of the Virginia Court.[23]

After various proceedings lasting throughout a five-year period, a three-judge District Court declared the rule in question unconstitutional on its face and enjoined the defendants from enforcing the said rule. This ruling was appealed on the grounds that *judicial* immunity foreclosed the issuance of declaratory and injunctive relief against the Virginia Court and its chief judge.

The Supreme Court held "that in *promulgating* disciplinary rules the Virginia Supreme Court acted in a legislative capacity" (emphasis supplied). *Id.* 446 U.S. at 731, 100 S.Ct. at 1974. As such the Virginia Court was entitled to the same type of immunity as would be forthcoming to the Virginia Legislature:

> ". . . [T]here is little doubt that if the Virginia Legislature had enacted the State Bar Code and if a suit had been brought against the legislature, its committees, or members for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid, the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity." (Footnotes omitted). *Id.* 446 U.S. at 733-34, 100 S.Ct. at 1975.

Thus the Virginia Court could not be forced to *amend* its code in any particular fashion by way of § 1983 equitable relief.

But, the Supreme Court found, the Virginia Court in addition to its legislative functions also has judicial and executive (i.e. enforcement) functions vis-a-vis the State Bar Code. With regards to the *enforcement* functions,[24] the Supreme Court specifically ruled that "the Virginia Court and its chief justice

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[23] Similar to Puerto Rico. 4 L.P.R.A. 773(g); *In re Gonzalez Blanes*, 65 P.R.R. 357 (1945).

[24] *Id.*

properly were held liable." *Id.*, 446 U.S. at 736, 100 S.Ct. at 1976. "[T]he Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were." *Id.* See also, *Id.*, 446 U.S. at 736-737, 100 S.Ct. at 1976-1977 specifically footnotes 15 and 16.

The Supreme Court then indicated that it would not decide whether judicial immunity would bar *prospective* enjoinment of the Virginia Court's *adjudicative* role in connection with an invalid rule. *Id.* 446 U.S. at 736, 100 S.Ct. at 1976. However, the opinion contains strong *dicta* to the effect that such a result is a distinct possibility. It points out that the Supreme Court has never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. *Id.* 446 U.S. at 735, 100 S.Ct. at 1976. It then discusses the split between the Court of Appeals on this issue, the Second, Fourth and Seventh Circuits denying the immunity with the Eighth, Ninth and District of Columbia Circuits holding the opposite view. *Id.*, footnote 13. In stating that the Supreme Court has not addressed the question the following language is of interest:

> "Although we did not address the issue, a state judge was among the defendants in *Mitchum* v. *Foster*, 407 U.S. 225 [92 S.Ct. 2151, 32 L.Ed.2d 705] (1972), where the Court held that § 1983 served to pierce the shield of 28 U.S.C. § 2283 against a federal court enjoining state-court proceedings. The Court did say, quoting from *Ex parte Virginia*, 100 U.S. 339, 346 [25 L.Ed. 676] (1880), to this effect, that § 1983 was designed to enforce the provisions of the Fourteenth Amendment against all state action, whether that action be executive, legislative or *judicial*. The Court also noted that the proponents of § 1983 at the time it was enacted insisted that state courts were being used to harass and injure citizens, perhaps because they were powerless to stop deprivations or were

> in league with those who were bent upon abrogating federally protected rights. 407 U.S., at 242 [92 S.Ct., at 2161]." (emphasis in the original; *Id.*, footnote 14).

In the present cases, the ultimate goal sought by Plaintiffs is, at the very least, the non-enforcement of Law No. 43 by the Puerto Rico Court, its Justices and the Colegio. In our opinion *Supreme Court of Virginia* v. *Consumers Union*, *supra*, does not bar such a goal.

We need not decide, for present purposes, whether future *judicial* actions of the Puerto Rico Court are subject to § 1983 equitable relief.

III. ALLEGATIONS RELATED TO ROOKER[25]

It is the contention of the Justices and the Colegio that this Court lacks jurisdiction in the present cases because they seek "to annul the disciplinary judgment rendered against Plaintiffs by the Supreme Court of Puerto Rico and to enjoin the effect of enforcement of said judgment", all of which is allegedly prohibited by *Rooker* v. *Fidelity Trust Co.* See "Memorandum of Law in Support of Defendants (sic) Justices Motion to Dismiss and/or For Summary Judgment", at page 6. Certainly, if this is true as to Plaintiffs Schneider-Ramos, it is not the case as to Plaintiffs Romany, Sous, and Oreste Ramos as to whom no disciplinary judgment has been entered by the Puerto Rico Court. We assume, therefore, that the *Rooker* arguments are limited to Plaintiffs Schneider and Ramos.

In *Rooker*, a suit in equity was filed in federal district court . . . "to have a judgment of a Circuit Court of the State declared null and void, and to obtain other relief dependent on that outcome." *Id.* 263 U.S. at 414, 44 S.Ct. at 149. It was alleged that the judgment rendered was in violation of the contract clause of the Constitution and of the due process and equal protection clauses of the Fourteenth Amendments. The

[25] *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923).

district court dismissed for lack of jurisdiction. In affirming this action the Supreme Court said:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the district courts is strictly original." 263 U.S. at 415-16, 44 S.Ct. at 150. (Citations omitted).

Thus, the *Rooker* decision stands for the proposition that "a federal district court is without jurisdiction to redetermine federal constitutional issues which have been litigated and decided by a prior *final judgment* of a state court." Justices Memorandum, *supra*, at page 9. (Emphasis supplied).[28]

In the Memorandum, counsel for Defendant Justices allege that "[t]he Supreme Court of Puerto Rico held that under the Puerto Rico and *Federal* Constitutions the plaintiffs broad-

[28] Compare this with Defendants' arguments to the effect that this is still an "ongoing" case. *Id.* at page 19.

based attack against the integrated bar and against the duty to pay dues to the bar and purchase forensic and notarial stamps failed." *Id.* at page 7. Of course this is a clear misstatement of the basis for the Schneider-Ramos ruling. We need not here repeat the numerous instances in which the Puerto Rico Court emphasizes its reliance *solely* on Puerto Rican Constitutional and statutory grounds.[28A] The Puerto Rico Court's statement to the effect "that the freedom of speech clause contained in Article II, Sec. 4 of the Constitution of Puerto Rico is not narrower than that given by the United States Supreme Court to the First Amendment in this context", is hardly a decision on Federal constitutional grounds, but rather, *reinforces the Puerto Rican substantive basis* of the *Schneider-Ramos* decision. Nor does the adoption of an *Abood*-like remedy, applied to a case decided pursuant to local standards, convert the *Schneider-Ramos* decision into a Federally-based decision. All reference to federal law in that case is purely for comparative purposes. Such a remedy when used to implement a finding based on Puerto Rican substantive law becomes a Puerto Rican remedy and does not change the Puerto Rican nature of the decision. The Puerto Rico Court only incidentally refers to decisions of the Supreme Court in determining the meaning of state law. Cf., *State Tax Comm'n* v. *Van Cott*, 306 U.S. 511, 514, 59 S.Ct. 605, 606, 83 L.Ed. 950 (1938).

The Puerto Rican basis of the *Schneider-Ramos* decision, and its studied avoidance of federal constitutional law as its *ratio decidendi*, in fact results in the elimination of any possible grounds for appeal or certiorari to the Supreme Court of the United States. 28 U.S.C. § 1258(2), (3). Cf. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-568, 97 S.Ct. 2849, 2852-2853, 53 L.Ed.2d 965 (1977); *Durley* v. *Mayo*, 351 U.S. 277, 281-282, 76 S.Ct. 806, 809, 100 L.Ed. 1178 (1956).

The complaint is concerned with the *Schneider-Ramos* decision in three principal ways. In the first instance Plaintiffs

[28A] See also the "Judgment" entered by the Puerto Rico Court.

Schneider and Ramos claim that they failed to receive a "full, fair and meaningful opportunity to be heard" in that case (see Complaint Section G, Paragraphs 47-48). Secondly, the Complaint challenges the remedy granted. *(Id.* Section H, Paragraphs 49-53). Lastly, it relies on the decision as a definitive interpretation by Puerto Rico's highest court for purposes of determining how Law No. 43 will be administered in the future by both the Puerto Rico Court and the Colegio.

[11] To the extent that any part of the Schneider-Ramos complaint may be interpreted as challenging the retroactive outcome of the disciplinary proceedings against these parties before the Puerto Rico Court, such a challenge is foreclosed in a § 1983 action. *Tang* v. *Appellate Division of the New York Supreme Court*, 487 F.2d 138, 143, 145-146 (C.A. 2, 1973), *cert. den.*, 416 U.S. 906, 94 S.Ct. 1611, 40 L.Ed.2d 111 (1974); *MacKay* v. *Nesbett*, 412 F.2d 846 (C.A. 9, 1969), *cert. den.*, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969); *Jones* v. *Hulse*, 391 F.2d 198 (C.A. 8, 1968), *cert. den.*, 393 U.S. 889, 89 S.Ct. 206, 21 L.Ed.2d 167 (1968); *Gately* v. *Sutton*, 310 F.2d 107 (C.A. 10, 1962). Thus, that part of the present Schneider-Ramos suit which seeks the reinstatement of said Plaintiffs to the practice of law for failure to pay the Colegio dues found to be owed in the *Schneider-Ramos* case is DISMISSED for lack of jurisdiction.

As to the issues raised in the present case by the *prospective* application of the *Schneider-Ramos* doctrine to the *future* administration of Law No. 43, Plaintiffs Schneider and Ramos stand on different footing vis-a-vis the *Rooker* doctrine. As to *prospective* enforcement, the *Schneider-Ramos* decision only serves as a definitive interpretation of a state statute by the highest court of Puerto Rico. Thus, the consideration by this Court of the issues raised by the *prospective* enforcement of Law No. 43 cannot be interpreted as an appeal from a state court opinion, but is rather a new federal case in which the state court's interpretation serves to establish what is the substantive state law that is applicable. In this respect, Plaintiffs

Schneider and Ramos stand in no different footing than brand new litigants, such as Plaintiffs Romany, Sous and Oreste Ramos, challenging the prospective validity of Law No. 43. See *Arrow* v. *Dow*, *supra*, 636 F.2d at 289.

Whether Plaintiffs Schneider and Ramos are barred from litigating such prospective issues by reason of the principles of res judicata and collateral estoppel are issues related to, but different from, the *Rooker* question. We now will consider those other issues.[27]

IV. RES JUDICATA AND COLLATERAL ESTOPPEL

[12] The Justices and the Colegio claim that the principles of res judicata and collateral estoppel prevent Plaintiffs from litigating the prospective Federal issues raised in the present cases.

Plaintiffs Romany,[28] Sous and Oreste Ramos contend that no such effect can be had against them because they were never parties to the litigation of the Schneider-Ramos issues on the merits. That suit, of course, was not a class action, whose results are binding on all members of the legal profession in Puerto Rico. *Hansberry* v. *Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1941); *Amezquita* v. *Colon*, 518 F.2d 8, 11 (C.A. 1, 1975). The *Schneider-Ramos* decision can therefore have no preclusive effects upon Plaintiffs Romany, Sous and Oreste Ramos. *Sea-Land Services Inc.* v. *Gaudet*, 414 U.S. 573, 593, 94 S.Ct. 806, 819, 39 L.Ed.2d 9 (1974); *General Foods Corp.* v. *Mass. Dept. of Health*, 648 F.2d 784, 787 (C.A. 1, 1981). The answer with regards to the other Plaintiffs is more illusive.

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[27] Plaintiffs Schneider-Ramos' claim that they failed to receive a fair hearing in *Schneider-Ramos* remains an issue relevant to that determination. See *Allen* v. *McCurry*, 449 U.S. 90, 101, 101 S.Ct. 411, 418, 66 L.Ed.2d 308 (1980).

[28] As previously indicated, Plaintiff Romany did not litigate on the merits and thus stands on equal footing with Plaintiffs Sous and Oreste Ramos.

At issue is the credit to be given to the judgment entered by the Puerto Rico Court in *Schneider-Ramos*, in the light of 28 U.S.C. § 1738 which states, in its pertinent part:

> "[The] ... judicial proceedings [of any court of any State] ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State. ..."

This statute in effect, is the enactment, in the broad sense,[29] of the Federal res judicata rules. See generally, Wright & Miller, *Federal Practice and Procedure*, Vol. 18, Sec. 4469, at page 661. It requires the Federal courts to look to the state courts to see what effect will be given to the judgment by said courts. *Allen* v. *McCurry*, *supra*, 449 U.S. at 96, 101 S.Ct. at 415. In the case of Puerto Rico, we look to the Civil Code of Puerto Rico, 31 L.P.R.A. 1 et seq., as the Supreme Court of Puerto Rico has rejected the "use of common law precepts to resolve problems of civil law." *Valle* v. *American International Ins. Co.*, 79 JTS 50 (May 5, 1979) (our translation); see also *Lausell Marxuach* v. *Diaz de Yanez*, 103 D.P.R. 533, 535 (1975).

In its pertinent part, Article 1204 of the Civil Code (31 LPRA 3343) reads as follows:

> "In order that the presumption of res-judicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the *most perfect identity* between the things, causes, and persons of the litigants, and their capacity as such." (Emphasis supplied).

See *Lausell Marxuach* v. *Diaz de Yanez*, *supra*, *Lopez Rivera* v. *Matos*, 101 D.P.R. 740 (1973).

[29] Cf. *White* v. *World Finance of Meridian, Inc.*, 653 F.2d 147, 150 n.5 (C.A. 5, 1981).

In *Lausell Marxuach* v. *Diaz de Yanez*, *supra*, the Puerto Rico Court held that by "thing", Article 1204 means the object or matter over which the action is exercised. In that case a stipulation resulting in a judgment, in which a house was declared community property, was held to bar a later suit involving the same parties to the stipulation, in which one of them claimed that title to the house was not community property. The Puerto Rico Court also defined the meaning of "causes" within the meaning of Article 1204. Citing from the Spanish commentator Manresa ("Comentarios al Codigo Civil Espanol, To. VIII, Vol. 20, 6a. ed. 1967, pag. 307"), the opinion states that this term means:

> "... [T]he fundamental grounds, the origin of the actions or exceptions raised and decided, which should not be confused with the means of proof nor the legal grounds of the claims adduced by the parties. ..." (translation ours).

In *Millan* v. *Caribe Motors Corp.*, 83 P.R.R. 474, 487 (1961), it was said that:

> "... [T]he best test for determining whether a former judgment is a bar to a subsequent action is to inquire whether the same evidence will sustain both actions. If different evidence is required to sustain the different actions, then the causes of action are different and the former judgment is no bar to litigate the other causes of action."

In *Millan*, the purchaser of a truck refused to continue payments on the vehicle because he claimed it was defective. Caribe Motors sued for repossession and won by default. While that matter was still pending Millan sued for rescission of the contract and for damages. Caribe Motors alleged that the second suit was, in effect, a defense to the repossession

which should have been alleged and litigated in that action. The Puerto Rico Court held that although "the better practice would have been to litigate everything within the repossession proceeding", no res judicata effects would be given to the first judgment because different causes of actions were involved. *Id.*, at 486. The decision went on to say:

> "... [B]ecause of the special and summary nature of [the repossession] proceeding ... we can not inexorably require that other causes of action foreign to repossession be litigated therein. ..." *(Id.* 487-488).

The decision also held that *(Id.* 486):

> "The doctrine of collateral estoppel by judgment does not apply either because, under that doctrine, the former judgment is conclusive only as to those matters which were actually raised and which were really or necessarily litigated and adjudicated, but it is not conclusive as to those matters which, though involved in the case, were not litigated and adjudicated in the former action."[30]

[13] If we apply these tests to Plaintiffs Schneider-Ramos' present § 1983 action, we are at difficulty to conclude that a Puerto Rican court, independently viewing such action, would consider it to have "the most perfect identity" with the *Colegio* v. *Schneider* disbarment proceeding. Clearly, the evidence necessary to establish Schneider-Ramos' non-payment of dues is different from that required in the present suit, particularly as limited by the present opinion. Furthermore, the summary nature of a disbarment proceeding, especially as regards the apparently limited discovery of evidence, should bring into play the *Millan* exception.

[30] Interestingly enough, the Puerto Rico Court here cites the Freeman's "Law of Judgments" and other common law sources as the basis for its holding.

[14] There are additional grounds for concluding that the *Colegio* v. *Schneider* decision does not bar the present action. Only a first judgment, on the merits of the same issue as in the second suit, bars the second action *(Mercado Riera* v. *Mercado Riera*, 100 P.R.R. 939 (1972)) and, as stated in *Millan*, collateral estoppel is applicable only if the issue has *actually* been litigated and determined. See also *Pereira* v. *Hernandez*, 83 P.R.R. 156 (1961); *Capo Sanchez* v. *Secretary*, 92 P.R.R. 817 (1965).

In the *Colegio* v. *Schneider* proceedings, Plaintiffs Schneider and Ramos filed motions, purportedly in compliance with *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), reserving for litigation in Federal Court their rights under the laws and Constitution of the United States and asking the Puerto Rico Court to abstain from deciding these issues. (See Exhibits 5 and 6 of the Justice's Motion to Dismiss). To these the Puerto Rico Court responded that it "shall decide according to law" (see Resolution of July 13, 1978, Exhibit 7 of Justices' Motion to Dismiss). The Puerto Rico Court then went on, as we previously indicated, to decide the *Colegio* case solely on Puerto Rican grounds, studiously avoiding the federal issues. Leaving aside for the moment the issue of the validity of the *England* reservations, the Puerto Rico Court cannot on the one hand fail to decide *Colegio* on federal grounds and then turn around through the Justices and claim that the present action is barred because the Puerto Rico Court could have decided *Colegio* on Federal grounds. Someone is "play[ing] at cat and mouse"[31] with Plaintiffs Schneider and Ramos. Under those circumstances, this Court, as in *Howell* v. *State Bar of Texas*, 674 F.2d 1027, 1031 (C.A. 5, 1982), must exercise jurisdiction over Plaintiffs' Schneider-Ramos' federal claims.

The decisions of the Puerto Rico Court have refused to apply res judicata when it would tend to defeat the ends of justice. *Perez* v. *Bauza*, 83 P.R.R. 213 (1961); *Suarez Fuentes* v.

[31] See In Re Berkan, 648 F.2d 1386, 1390 (C.A. 1, 1981).

Superior Court, 88 P.R.R. 133 (1963). The barring of the present action as limited by this decision would, under the circumstances of this case, be a gross miscarriage of justice. The matters here at issue do not concern "purely private relations devoid of public interest considerations"; thus a Puerto Rican Court would find departure from res judicata warranted. See *Rodriguez* v. *Baldrich*, 508 F.Supp. 614, 619 (D.C.P.R., 1981).

It may not be coincidental that the briefs in support of the Motions to Dismiss, on this point are almost totally devoid of Puerto Rican citations. Interestingly enough these rely almost exclusively on Federal law. However, their contentions fare no better under that law.

The Justices and the Colegio rely on *Allen* v. *McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), as the principal basis for alleging that Plaintiffs Schneider and Ramos' present action is barred by res judicata-collateral estoppel principles. In that case, McCurry was tried and convicted in state court notwithstanding the suppression of some evidence seized when the police entered his house after a shootout. The state court held that evidence seized in plain view was admissible. McCurry then brought a § 1983 action in Federal Court, the gist of which was the alleged unconstitutional search and seizure. He made no claim that the state courts had denied him a "full and fair opportunity" to litigate the search and seizure claim. The Federal court dismissed the federal action pursuant to the principles of collateral estoppel. The Court of Appeals, reversed, and, in turn, it was reversed by the Supreme Court. The Court stated (at 449 U.S. at 94, 101 S.Ct. at 414):

> "The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that

action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. . . ." (citations omitted).

[15, 16] In its broadest sense, the term "res judicata" refers to the distinctive effects of a judgment, separately characterized as "claim preclusion" and "issue preclusion." The first, forecloses any litigation of matters that never have been litigated, because of a determination that they should have been advanced in an earlier suit. *Lovely* v. *Laliberte*, 498 F.2d 1261 (C.A. 1, 1974). The second, has the effect of foreclosing relitigation of matters that have once been litigated and decided.

". . . '[C]laim preclusion', or true res judicata . . . treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action' . . . Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial . . . The aim of claim preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach.

"The second doctrine, collateral estoppel or 'issue preclusion', recognizes that suits addressed to particular claims may present issues relevant to suits on other claims . . . [I]ssue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment in a prior litigation between the same parties . . . [T]he contested issue must have been litigated and necessary to the judgment earlier rendered." *Kaspar Wire Works, Inc.* v. *Leco Eng. & Mach. Inc.*, 575 F.2d 530, 535-536 (C.A. 5, 1978).

The burden of establishing preclusion is placed on the party claiming it. *Oldham* v. *Pritchett*, 599 F.2d 274, 277 (C.A. 8, 1979); *Peters* v. *Missouri-Pacific R. R.*, 483 F.2d 490, 500 (C.A. 5, 1973), *cert. den.*, 414 U.S. 1002, 94 S.Ct. 356, 38 L.Ed.2d 238 (1973); *United States* v. *Davis*, 460 F.2d 792, 796 (C.A. 4, 1972); *Hayles* v. *Randall Motor Co.*, 455 F.2d 169, 173 (C.A. 10, 1972) and reasonable doubts will be resolved against an asserted preclusion. *Harris* v. *Jacobs*, 621 F.2d 341, 343 (C.A. 9, 1980); *McNellis* v. *First Fed. Sav. & Loan*, 364 F.2d 251, 257, n.8 (C.A. 2, 1966), *cert. den.*, 385 U.S. 970, 87 S.Ct. 504, 17 L.Ed.2d 434 (1966); *Northern Oil Co.* v. *Socony Mobil Oil Co.*, 368 F.2d 384, 388 (C.A. 2, 1966).

[17] A judgment must possess certain characteristics to qualify for claim preclusion: (1) it must have been rendered by a court of competent jurisdiction, (2) it must be a final judgment on the merits, and (3) there must be an absence of fraud or some other factor invalidating the judgment. See Wright & Miller, *supra*, Sec. 4406 at p. 46. Claim preclusion operates only against the parties to the first suit or those in privity with them.

[18] Where the object of the first proceeding is to establish the legality of continuing conduct into the future, a second action is precluded by the first judgment. *Carr* v. *United States*, 507 F.2d 191 (C.A. 5, 1975), *cert. den.* 422 U.S. 1043, 95 S.Ct. 2657, 45 L.Ed.2d 694 (1975). Where the first action concerns only a litigation of past legal conduct however, a new claim or cause of action is created as the conduct continues, and the new claim is not precluded. *Blair* v. *City of Greenville*, 649 F.2d 365, 368 (C.A. 5, 1981); *United States* v. *American T. & T.*, 524 F.Supp. 1336 (D.C.D.C., 1981); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 327-329, 75 S.Ct. 865, 868-869, 99 L.Ed. 1122 (1955); *International Harvester Co.* v. *OSHA*, 628 F.2d 982, 985-986 (C.A. 7, 1980); *Kilgoar* v. *Colbert County Bd. of Ed.*, 578 F.2d 1033, 1035 (C.A. 5, 1978); *Crowe* v. *Leeke*, 550 F.2d 184, 187 (C.A. 4, 1977); *Dawkins* v. *Nabisco, Inc.*, 549 F.2d 396, 397

(C.A. 5, 1977), *cert. den.*, 433 U.S. 910, 97 S.Ct. 2978, 53 L.Ed.2d 1095 (1977). Cf. *Commissioner* v. *Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948); *United States* v. *Rexach*, 482 F.2d 10, 19 (C.A. 1, 1973), *cert. den.*, 414 U.S. 1039, 94 S.Ct. 540, 38 L.Ed.2d 330 (1973). Thus claim preclusions cannot apply in settings of continuing conduct.

[19] Furthermore, apart from compulsory counterclaim rules, the traditional conclusion has been that purely defensive use of a theory does not preclude a later action for affirmative recovery on the same theory. Cf. *Virginia-Carolina Chem. Co.* v. *Kirven*, 215 U.S. 252, 30 S.Ct. 78, 54 L.Ed. 179 (1909); see Wright and Miller, *supra*, at § 4414, at pages 116-117.

Issue preclusion is, simply put, a principle that later courts should honor the first decision of a matter that has been actually litigated.

> "... [a] right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pacific R. R.* v. *United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897).

[20] The fundamental rationale of issue preclusion dictates the clearly settled requirement that it be limited to matters that have been actually decided. *Brown* v. *Felsen*, 442 U.S. 127, 139 n.10, 99 S.Ct. 2205, 2213 n.10, 60 L.Ed.2d 767 (1979); *Montana* v. *United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979). Mere prior litigation of an issue without a decision does not justify preclusion when the

same issue arises under a different claim or cause of action. The burden is on the party asserting preclusion to show actual decision of the specific issues involved. *Spilman* v. *Harley*, 656 F.2d 224, 229 (C.A. 6, 1981); *Hernandez* v. *City of Los Angeles*, 624 F.2d 935, 937 (C.A. 9, 1980); *Glass* v. *U. S. Rubber Co.*, 382 F.2d 378, 384 (C.A. 10, 1967).

Preclusion cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. *Allen* v. *McCurry*, *supra*, 449 U.S. at 90, 101 S.Ct. at 411; *Kremer* v. *Chemical Construction Co.*, ___ U.S. ___, ___-___, 102 S.Ct. 1883, 1897 (1982). Thus it is a bar only "in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them." *Allen* v. *McCurry*, *supra*, 449 U.S. at 99, 101 S.Ct. at 417. The Court continues:

> "... [T]he federal courts could step in where the state courts were unable or unwilling to protect federal rights ... This understanding of § 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, would be essentially the same as the important general limit on rules of preclusion that already exist: Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *(Id.* at 101, 101 S.Ct. at 418).

[21] The above thus stand for the proposition that neither claim nor issue preclusion is warranted if:

(1) the state court "has [not] shown itself willing and able to protect federal rights." *Id.* at 104, 101 S.Ct. at 420, and

(2) if the parties have not been given a full and fair opportunity to litigate the federal claims, *Id.*

[22] It is clear, as previously pointed out in this opinion, that the Puerto Rico Court avoided deciding *Colegio* v. *Schneider*, *supra*, on federal grounds. The circumstances of this case lead us to the conclusion that said Court was unwilling to protect Schneider-Ramos' *federal* rights.[32] Furthermore, the Federal constitutional issues were not only not decided, but were neither briefed nor argued. This can hardly amount to a "meaningful" hearing of the *federal* issues. See *Bickham* v. *Lashof*, 620 F.2d 1238, 1246 (C.A. 7, 1980). Nor was discovery of any substance in fact allowed. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 331 n.15, 99 S.Ct. 645, 651 n.14, 58 L.Ed.2d 552 (1979).

Wooley v. *Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) is relevant to the present setting. The facts of that case and its procedural history are of some importance.

New Hampshire requires all noncommercial vehicles to bear license plates embossed with the state motto, "Live Free or Die", and make it a misdemeanor to obscure the motto. Maynard covered up the motto on his license plates alleging that dissemination of that message, by reason of his being forced to display it in his car, violated his religious and political beliefs. At the first of three trials, Maynard explained his religious objections to the trial court. Nevertheless he was found guilty on all three separate charges and upon refusing to pay the fines imposed was sentenced to, and served, 15 days in jail. No appeal was taken from any of the sentences. Instead, Maynard filed an action in Federal District Court pursuant to 42 U.S.C. § 1983 seeking injunctive and declaratory relief against enforcement of the New Hampshire statutes *in the future*.

[32] Cf. *Pan American Computer Corp.* v. *Data General Corp.*, No. 79-184, decided by the Supreme Court of Puerto Rico on May 14, 1981.

The state claimed before the three judge district court that Maynard was barred by his failure to appeal any of his three state convictions. The opinion of the Court (Coffin, C. J.) indicated that plaintiffs were not collaterally attacking the state court convictions but rather seeking purely prospective relief. 406 F.Supp. 1381, 1385. The Court stated that (*Id.* n.6):

> "A more plausible position for defendants to take would be that Mr. Maynard's state convictions bar litigation of the federal constitutional issues. Although more plausible, this argument too fails. The first circuit has held that a state criminal conviction will have a preclusion effect in a federal civil rights action only with respect to matters actually litigated and decided at the state criminal trial . . . Since the constitutionality of the state statutes was not litigated by Mr. Maynard in the state misdemeanor proceedings, collateral estoppel principles do not preclude this court from considering this issue." (citations omitted).

The Supreme Court, in substance confirms the procedural aspects of the decision below. See 430 U.S. at 710-711, 97 S.Ct. at 1432-1433.

In upholding the ruling granting an order prohibiting New Hampshire from the *future* prosecution of Maynard for conduct similar to that which led to his three convictions, the Supreme Court states (430 U.S. at 714, 97 S.Ct. at 1435):

> "W begin with the proposition that the right of freedom of thoughts protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . A system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to

> speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"

This case has more than passing relevance to both the procedural and substantive issues raised by the present dispute.

In summary, we hold that the failure to grant Plaintiffs Schneider and Ramos a full and fair opportunity to litigate the *prospective* federal issues raised herein in the *Colegio* v. *Schneider* case before the Puerto Rico Court, as well as the unwillingness of that Court to consider and decide those issues, dispense with our having to grant either res judicata or collateral estoppel effect to the litigation in this Court of those prospective issues.

It is thus unnecessary for us to decide the legal consequences of the so-called *England* reservations, as such. But cf. *Lovely* v. *Laliberte*, *supra*, 498 F.2d at 1263-1264.

V. YOUNGER v. HARRIS[33]

[23] The Justices and the Colegio contend that the Puerto Rican Court's retention of jurisdiction for purposes of supervising the *Abood*-like remedy provided in *Colegio* v. *Schneider* makes this case an ongoing judicial proceeding, which deprives this Court of jurisdiction to consider injunctive and declaratory relief. In addition to *Younger* v. *Harris*, and other cases cited in its brief, reliance is also placed on *Middlesex County Ethics Committee* v. *Garden State Bar Association*, ___ U.S. ___, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982).

To begin with, this contention flies in the face of the Puerto Rico Court's own rulings in the *Colegio* v. *Schneider* case, to say nothing of the conflicting positions taken by the Justices in the Motion to Dismiss.[34] In its "Resolution" of June 3, 1982, wherein Schneider-Ramos were separated from the practice of

[33] 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 639 (1971).

[34] Ex., allegation of res judicata, which requires a final judgment.

law and notarial practice until they paid the sums owed the Colegio, the Puerto Rico Court unequivocally stated that "[t]he judgment of this Court is now final and unappealable" (See Exhibit 12 of Motion to Dismiss). Can it be seriously alleged now that such is not the case?

Schneider-Ramos' rights as to the past dues have been finally adjudicated. Those rights, however, are not before this Court. *All* Plaintiffs seek only to prevent *prospective* enforcement of Law No. 43, as interpreted by the Puerto Rico Court. There is no ongoing state *disbarment* proceeding involving that issue. It is such an ongoing action that was barred by *Middlesex*, to allow the state to interpret its rules in the face of a constitutional challenge. The Puerto Rico Court has interpreted the law on Puerto Rican constitutional grounds. All that remains to be decided is whether the law can be enforced against all Plaintiffs in the *future*, in the face of a *federal* constitutional issue never decided by any court. Such a challenge is permissible under *Wooley* v. *Maynard*, *supra*, 430 U.S. at 710-711, 97 S.Ct. at 1432-1433, among others.

There is no ongoing state disciplinary proceeding within the meaning of *Younger* or *Middlesex*.

V. ALLEGATIONS CONCERNING THE BUTLER ACT

[24] The Butler Act, 48 U.S.C. § 872 provides, in part, that:

> "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico."

Plaintiffs seek equitable relief against the Secretary of Justice and the Secretary of the Treasury to prevent them "from . . . us[ing] . . . public services, funds and property to sell forensic and notarial stamps and enforce the sale of said

stamps for the benefit of the Colegio. (See Paragraph 2(c) of the prayer in the Complaint.) Plaintiffs also seek relief from payment of mandatory Colegio dues. All of these allegations are based on their claims to the effect that they are being forced, by these payments, to support ideological activities which are contrary to their beliefs.

The Secretaries claim that as applied to the notarial stamps and the forensic stamps, which they allege are taxes, these requests for relief amount to a restraint on the collection of taxes, all of which violates the provisions of the Butler Act. The Justices and the Colegio join this contention, but include also an allegation to the effect that the Colegio dues are also a tax within the Butler Act!

Our starting, and finishing, point is a determination of whether the collections in question are "taxes" within the meaning of the Butler Act. It should be noted that the Butler Act has been held to be the substantive equivalent of the Tax Injunction Act. 28 U.S.C. § 1341. *United States Brewers Assoc. Inc.* v. *Cesar Perez*, 455 F.Supp. 1159 (D.C.P.R. 1978), *rem.* on other grounds, 592 F.2d 1212 (C.A. 1, 1978), *cert. den.*, 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed.2d 43 (1979).

It has been held that a determination of what is a "tax" under the Tax Injunction Act "should be [done] as a matter of federal law by reference to congressional policies underlying the Tax Injunction Act, rather than by adoption of state tax labels developed in entirely different legal contexts." *Robinson Protective, etc.* v. *City of Philadelphia*, 581 F.2d 371, 374 (C.A. 3, 1978). Two purposes are identified in that case as the reasons behind that statute: first, to deprive out-of-state corporations of an advantage over state taxpayers in being able to threaten localities with protracted litigation in federal courts, which induces the localities to compromise their tax claims; and second, to avoid federal judicial interference with state revenue raising operations and administration of their tax codes. *Id.* 581 F.2d at 375-376.

Neither of these purposes are called into play by the collections in question. Obviously only local entities are involved in the present dispute. Furthermore, no *state* revenue is at issue, as all funds collected go either directly, or by transmission, to the Colegio. The local government does not even charge the Colegio for its administrative expenses in the sale of stamps and collection of moneys.

There is no violation of the Butler Act by these actions.

VI. CONCLUSION

1. The non-conspiracy allegations of Plaintiffs, as regards the future enforcement of Law No. 43 and related laws, state a cause of action upon which relief may be granted pursuant to 42 U.S.C. § 1983;

2. The conspiracy allegations against the Justices and Colegio are hereby dismissed for failure to state a claim pursuant to 42 U.S.C. § 1983;

3. The claim for damages against the Justices and the claim for damages against Colegio, as applied only to the later's prosecutorial activities in *Colegio* v. *Schneider*, *supra*, are dismissed for failure to state a claim pursuant to 42 U.S.C. § 1983. Damage claims against Colegio for use of funds *prior* to the *Colegio* v. *Schneider*, *supra*, judgment are also dismissed;

4. All allegations or claims seeking in any way to modify, alter, challenge or otherwise affect the outcome of the suspension for non-payment of past dues of Plaintiffs Schneider and Ramos in *Colegio* v. *Schneider*, *supra*, are dismissed for lack of jurisdiction; and

5. All other allegations in Defendants' various Motions to Dismiss and/or Summary Judgment are denied.

IT IS SO ORDERED.

APPENDIX F

United States Court of Appeals
District of Puerto Rico

Civ. Nos. 82-1459, 82-1513, 82-1514
and 82-1532.

Robert E. SCHNEIDER, Jr., et al.,
PLAINTIFFS,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO, et al.,
DEFENDANTS.

JUNE 16, 1983.

Robert E. Schneider, Jr., Santurce, P.R., pro se and for plaintiffs.

Salvador Antonetti, Jay Garcia-Gregory, San Juan P.R., Miriam Naveira de Rodon, Santurce, P.R., Jose Julian Alvarez Gonzalez, University of Puerto Rico, Rio Piedras, P.R., for Justices of Supreme Court P.R.

Pedro A. del Valle Ferrer, Federal Litigation Div., Dept. of Justice, San Juan, P.R., for Secretaries of Justice & Treasury.

Harry Anduze Montano, Santurce, P.R., for Colegio & Fundacion de Abogados.

MEMORANDUM OPINION

TORRUELLA, Chief Judge.

The issues presented by these cases go to the very heart of the speech and associational freedoms protected by the First Amendment to the Constitution of the United States. More accurately stated, these cases involve Plaintiffs' constitutional "right not to speak or associate at all — that is, a right to be

free from governmental compulsion to engage in speech or associational activities."[1] In these actions, all filed pursuant to 42 U.S.C. § 1983, Plaintiffs challenge the prospective[2] validity of various Puerto Rican statutes which create,[3] and financially support,[4] Puerto Rico's integrated bar association, the Colegio de Abogados de Puerto Rico, hereinafter called the "Colegio". It is claimed that these laws are invalid because they force Plaintiffs to belong to, and financially support, an organization which promotes ideological and/or political causes which are contrary to Plaintiffs' personal beliefs.

The procedural and non-central issues raised by Defendants' responsive pleadings have been previously decided by the Court. See *Schneider* v. *Colegio de Abogados de Puerto Rico*, 546 F.Supp. 1251 (D.P.R. 1982) aff'd in part, reversed in part *sub nom., In Re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17 (CA 1, 1982). The issues remaining to be decided are thus reduced to, (1) a factual determination as to whether or not the Colegio engages in ideological and/or political activism, (2) if so, whether it is the result of or is supported by governmental action, and finally, assuming that the previous questions are answered in the affirmative, (3) a determination of the legal consequences resulting therefrom. *Abood*

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[1] Gaebler, "First Amendment Protection Against Government Compelled Expression and Association", 23 B.C.L.Rev. 995 (1982). See also *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Wooley* v. *Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

[2] See *District of Columbia Court of Appeals* v. *Feldman*, (1983), ____ U.S. ____, 103 S.Ct. 1303, 75 L.Ed.2d 206. See also *Schneider* v. *Colegio de Abogados de Puerto Rico*, 546 F.Supp. 1251, 1267-1268 (D.P.R. 1982) aff'd in part, reversed in part *sub. nom., In Re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17 (CA 1, 1982); see also *Piper* v. *Supreme Court of New Hampshire*, 708 F.2d 825, at 828, n.4 (CA 1, 1983).

[3] Law No. 43 of May 14, 1932 (hereinafter Law 43) (4 L.P.R.A. 771 *et seq.*).

[4] Section 11 of Law 43 (4 L.P.R.A. 783), Law No. 115 of May 6, 1941 (hereinafter Law 115) (4 L.P.R.A. 785); Law No. 99 of June 27, 1956 (hereinafter Law 99) (4 L.P.R.A. 1001 *et seq.*).

v. *Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Arrow* v. *Dow*, 636 F.2d 298 (CA 10, 1980), on remand 544 F.Supp. 458 (D.N.M. 1982).

The Colegio's Ideological and/or Political Actions

There is no question but that the Colegio engages in ideological and/or political activism of a pervasive and continuous nature, totally unrelated to the stated legislative purposes for which is was created.[5] Among the activities which may be classified as ideological and/or political in nature[5a] are the following:

[5] 4 L.P.R.A. 772 states that:

"That Bar Association of Puerto Rico shall have the following duties: (1) to cooperate in the improvement of the administration of justice; (2) to render such reports and give such advice as the government may require of it; (3) to defend the rights and immunities of lawyers and to procure their enjoyment in the courts of the liberty necessary for the proper exercise of their noble profession; (4) to promote fraternal relations among its members, and (5) to maintain healthy and strict professional morals among the members."

[5a] It is easier to talk about "ideological" and "political" activities than to define these terms. The *Encyclopaedia Britannica* defines "ideology" as a form of social or political philosophy, a system of ideas that aspires both to explain the world and to change it. *Encyclopaedia Britannica*, 15th Ed., s.v. "ideology". *The International Encyclopedia of the Social Sciences* defines this term as "one variant form of those comprehensive patterns of cognitive and moral beliefs about man, society, and the universe in relation to man and society, which flourish in human societies." *International Encyclopedia of the Social Sciences*, s.v. "ideology". The word "ideology" first made its appearance in France as *ideologie* during the French Revolution when introduced by a philosopher, A.L.C. Destutt de Tracy, as a short name for what he called his science of ideas. The "science of ideas" was a science with a mission; it aimed at serving men, even saving them, by ridding their minds of prejudice and preparing them for the sovereignty of reason. Thus "ideology" has been from its inception a word with a marked emotive content. The subject of ideology is a controversial one, and it is arguable that at least some part of this controversy derives from disagreement as to the definition of the word "ideology". One can however, discern both a strict and a loose way of using it. In the loose sense of the word, ideology may mean any kind of action-oriented theory or any attempt to approach politics in the light of a system of ideas. Ideology in the stricter sense stays fairly close to Destutt de Tracy's original conception, and may be characterized by five character-

(1) At least since 1973,[6] the President[7] of the Colegio has made annual appearances before the United Nations to present the "official" position of the Colegio with regard to the political status of the Commonwealth of Puerto Rico to the effect that the Commonwealth is a colony of the United States, and to request that the "case" for its decolonization be submitted for action to the United Nations General Assembly.

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istics: (1) it contains an explanatory theory of a more or less comprehensive kind about human experience and the external world; (2) it sets out a program, in generalized and abstract terms, of social and political organization; (3) it conceives the realization of this program as entailing a struggle; (4) it seeks not merely to persuade but to recruit loyal adherents, demanding what is sometimes called commitment; (5) it addresses a wide public, but may tend to confer some special role of leadership on intellectuals. See generally: Destutt de Tracy, *Elemens d'Ideologie*, 2nd ed. (1817); See Generally, John Plamenatz, *Ideology* (1970); R.H. Cox (ed.) *Ideology, Politics and Political Theory* (1969); George Lichtheim, *The Concept of Ideology* (1967).

Abood v. *Detroit Board of Education*, *supra*, gives us a definition of "political activity" which suffices for the moment:

". . . [An] attempt to influence governmental policymaking . . ." 431 U.S. at 231, 97 S.Ct. at 1797 (1977).

Perhaps we should adopt a position similar to that espoused by Justice Stewart in *Jacobellis* v. *Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964), when attempting to define obscenity and pornography, which he deemed was equivalent to "trying to define what may be indefinable." He conceded that "perhaps [he] could never succeed in intelligibly doing so. But [he knew] it when [he saw] it," a position not too distant from the Court's in this case.

[6] A ten year period back from the date of the trial was used as background to the issues raised by this case.

[7] The Colegio is governed by a general assembly and a Governing Board. 4 L.P.R.A. 776. The latter is composed of the Colegio president, twenty-eight delegates and the outgoing president, who sits as an ex-officio member without voting power. Twenty-four of the delegates are elected by twelve different regional delegations, each of which elect two delegates for a two-year term. The Colegio President and the other four at-large-delegates are elected at the general assembly also for a two-year term. 4 L.P.R.A. 777. The Colegio president runs the Colegio on a day-to-day basis through the Colegio's executive secretary, appointed by him with the Board's approval. The Board meets frequently to pass upon the resolutions of the Colegio, which as will be seen, cover a wide range of matters.

This position is espoused as representing the views of *all* the members of the Colegio.[8]

The appearances by the Colegio before the United Nations' Decolonization Committee, as well as the substance of the Colegio's position therein, have received wide-spread publicity in Puerto Rico and in the international news media.

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[8] In his 1973 appearance, the current president of the Colegio, Arturo Negron Garcia, who was also president at that time, stated that the position assumed before the United Nations represented the position "consistently assumed [by the Colegio] during the last 30 years through its General Assembly, which represents the feelings of the 3,000 lawyers who practice in Puerto Rico. "See Plaintiffs' Exhibit 23, p. 332. At this hearing the Colegio introduced, as part of its presentation, (1) a resolution adopted by the General Assembly of the Colegio on September 1, 1944 among other things "denouncing . . . the colonial government . . . [which was maintained] . . . in power . . . only by force . . . and coercion [of the United States]" and authorizing that expenses be incurred by the Colegio to correct this situation *(Id.*, p. 342), (2) the report of the Constitutional Law Committee of the Colegio approved by the General Assembly of February 21, 1963, expressing the substantive requirements acceptable to the Colegio of the three political status formulas to be considered in any plebiscite, and (3) a report of the subcommittee of the Committee on the Constitutional system of the Colegio adopted by the General Assembly on September 2, 1972, dealing with the juridical relations between Puerto Rico and the United States.

This matter was published *in toto* in the Colegio's law review. See 35 *Rev. Col.Ab.P.R.* 329 (1974).

Also published therein was the testimony of Colegio President Graciany Miranda Marchand before the Decolonization Commiteee on August 15, 1977. 39 *Rev.Col.Ab.P.R.* 157 (1978). See Plaintiffs' Exhibit 237. In this appearance the Colegio basically reiterates the position previously indicated regarding the alleged colonial status of Puerto Rico.

The testimony of Colegio President Luis F. Camacho before the Decolonization Committee in August 1981 and 1982 was published in Colegio newsletters. See Plaintiffs' Exhibit 238 and 239. In them the Colegio president, "speaking" for the 6,000 odd members of the Colegio, again sought United Nations intervention to end Puerto Rico's alleged colonial status "maintained by force by the United States while exercising an intolerable degree of juridical coercion". Exhibit 238, p. 2.

In fact, if not in law, when a Colegio president "speaks" for the membership he can hardly claim unity. In 1974, the Colegio sponsored an empirical study of the attitudes of the membership toward the Colegio and the reasons for these attitudes. This study, which was directed by the then dean of the Law School at the University of Puerto Rico and the present-day President of Catholic University, revealed a very low level of participation or support of

(2) The Board of Governors has adopted many resolutions dealing with diverse topics of an ideological and/or political nature. These include among others: condemning the Federal Bureau of Investigation for "intervention" with the Puerto Rican independence movement and its leaders (Plaintiffs' Exhibit 44); opposing an increase in the number of Federal Judges in Puerto Rico as an "attempt to fortify Federal Control over the island contrary to the duty of Congress to recognize the right of Puerto Rico to assume full sovereignty" (Plaintiffs' Exhibit 46); requiring that the President of the United States order the Navy to cease target practice in the island of Vieques and withdraw therefrom," and that this resolution be sent to the Puerto Rican Legislature, to Congress, to the President, to the Decolonization Committee of the United Nations and to the media for massive promulgation" (Plaintiffs' Exhibit 49);[9] resolving to "orient and inform" the people of Puerto Rico regarding the resolution of the Decolonization Committee of the United Nations regarding Puerto Rico (Plaintiffs' Exhibit 235 at p. 14. Resolution No. 6); condemning the Legislature of Puerto Rico for its "distortion [of] the historical truth" in condemning the previously referred to resolutions of the Decolonization Committee (Plaintiffs' Exhibit 235 at p. 29, Resolution No. 14); requesting the President of the United States that he release four Puerto Rican Nationalists convicted of participating in the shootings in Congress in 1952 (Plaintiffs' Exhibit 61); opposing a new voter identification system proposed by the Puerto Rico Electoral Committee (Plaintiffs' Exhibit 62); re-

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the Colegio's activities by its membership, a situation attributed in some measure to the Colegio's intervention in political activism. See Jaime B. Fuster, "Los Abogados de Puerto Rico", pp. 64, 76-82 (Plaintiffs' Exhibit 8)

[9] The annual assembly of the Colegio, at its September 2, 1978 meeting adopted a similar resolution (Plaintiffs' Exhibit 52). This same assembly passed a resolution seeking an investigation by various entities including the United Nations, the Civil Rights Commission and various others (including the Colegio's own Civil Rights commission) of the shooting by the police of two independence advocates while allegedly attempting to destroy communications facilities in Cerro Maravilla, Puerto Rico (Plaintiffs' Exhibit 51.)

pudiating the Somoza regime in Nicaragua, supporting the Sandinista Front of National Liberation, and asking the United States to recognize the "Provisional Government of National Reconstruction" (Plaintiffs' Exhibit 235 at p. 66, Resolution No. 32); condemning the Russian invasion of Afghanistan (Plaintiffs' Exhibit 235 at p. 91, Resolution No. 43); expressing support for Olympic sports and that the Puerto Rico Olympic Committee be the one to decide whether or not to boycott the Moscow Olympic Games (Plaintiffs' Exhibit 235 at p. 92, Resolution No. 44); stating the Colegio's concern "in the name of all qualified voters" as to the state of the electoral process and authorizing the president of the Colegio to name a committee "to watch and guarantee the purity of the electoral process" (Plaintiffs' Exhibit 235 at p. 102, Resolution No. 51); expressing the Colegio's solidarity with the people of El Salvador and condemning the governing Military Junta (Plaintiffs' Exhibit 235 p. 114, Resolution No. 2); endorsing and supporting a march to be held favoring the movement to get the Navy to leave Vieques (Plaintiffs' Exhibit 236 at p. 129, Resolution No. 10); asserting the "defense" of Puerto Rican culture and rejecting "the efforts of the Commonwealth with relation to the Institute of Puerto Rican Culture as attempts to destroy the cultural heritage of Puerto Rico" (Plaintiffs' Exhibit 235 at p. 135, Resolution No. 13); criticizing the United States for transferring Haitian refugees to Puerto Rico and demanding their immediate release to the mainland (Plaintiffs' Exhibit 235 at p. 149, Resolution No. 21); condemning the United States "for imposing a concentration camp on Puerto Rico in complicity with the Government of Haiti" (Plaintiffs' Exhibit 235 at p. 167, Resolution No. 30); opposing the use of the Federal Grand Jury system in Puerto Rico (Plaintiffs' Exhibit 235, at p. 137, 151, 162, Resolutions Nos. 14, 22, 28); blaming the police and the University Administration for the use of force in a strike by students at the University of Puerto Rico (Plaintiffs' Exhibit 235 at p. 201, Resolution No. 42); condemning the draft as a "blood tax paid by Puerto Ricans in the four wars

fought in the Armed Forces of the United States" (Plaintiffs' Exhibit 235 at p. 203, Resolution No. 43);

All of the above have been widely disseminated by the Colegio throughout the news media, as a matter of practice and routine.

(3) The physical facilities of the Colegio have been routinely used for ideological and/or political activities unrelated to the purposes of the Colegio. These activities have included among others:[10] a concert to raise funds for the accused in the armed robbery of a Wells Fargo truck; a press conference by the "Committee for the Defense of Our Dignity"; a press conference by the "Committee for the Defense of Democracy in Haiti"; numerous press conferences by labor unions; assembly of the "National Committee for the Defense of Vieques"; meetings of the "Committee for the Selection of Celeste as Mayor"; a press conference of the "Pastors' Association"; a seminar about the "organizational and political aspects of the Grand Jury"; press conferences of the Puerto Rican Socialist Party; press conference of the "United Committee Against Repression"; public hearing of the Central Committee of the Popular Democratic Party; meetings to organize a defense committee by the Puerto Rican Socialist League; a meeting of the leadership of the Popular Democratic Party in San Juan; a meeting of the San Juan Zone of the Puerto Rican Socialist Party; an organizational meeting of "Citizens interested in the improvement of TV"; meetings of the "Crusade for the Rescue of Vieques"; a press conference of the "Artists in Favor of Artistic Freedom"; commemoration of the anniversary of the death of Dr. Pedro J. Chamorro;[11] a press conference of the "Committee for the Defense of Puerto Rican Culture"; a press conference and meetings of the "Committee for the Defense of Nicaragua"; meetings of the "Law Students Council" in connection with the strike at the University of Puerto Rico; a con-

[10] See Plaintiffs' Exhibits 247, 248, 249, 250.

[11] A Nicaraguan journalist killed during the Sandinista revolution in Nicaragua.

cert by the "Committee for the Defense in Support of the Puerto Rico Prisoners of War";[12] a press conference of the "Committee for the Rescue of Villa Sin Miedo",[13] as well as various meetings and conferences related thereto; a movie-showing by "Claridad", the official newspaper of the Puerto Rican Socialist Party, dealing with education in Cuba; a press conference by the Federation of University Students for Independence in connection with the "situation" at the University of Puerto Rico; an activity of the Puerto Rican Socialist Party in support of Cuba; a "cultural-political" activity by the "Committee for the Defense of Nicaragua"; a press conference by the local of the Professional Air Traffic Comptrollers Organization regarding their negotiations and strike; a showing of the movie "El Salvador; the people shall triumph," by the "Puerto Rican Committee in Solidarity with the Salvadorian People," as well as numerous other activities by said organization; a conference by the Dominican Revolutionary Party; meetings and press conferences of the "Committee Against the Uniform Increase in Tuition" of the University of Puerto Rico; a press conference of the Vieques Fishermen's Association regarding military maneuvers in the Caribbean Area; a press conference by the "Puerto Rican Ecumenical Social Action Committee" about the role of the "Church in the 80's"; an organizing meeting of the New Progressive Party followers of "Hernan Padilla for Governor"; the annual assembly of the "Puerto Rican Confederation of Spiritualists"; a press conference of the "National Ecumenical Movement" in support of the people of El Salvador.

Many of these activities were held without any charge being made by the Colegio to the sponsoring group, or with only a

[12] A euphemism for the alleged FALN terrorists arrested in the Mainland.

[13] A community of squatters on government land which had to be forcedly evicted by the Police after various legal proceedings in the Commonwealth Courts. See *Miguel Gonzalez Rodriguez, et al.* v. *Autoridad de Tierras de Puerto Rico, et al.*, Num. 0-81-694 (Supreme Court of Puerto Rico, Sentence of March 16, 1982).

nominal fee being charged.[14] Irrespective of whether or not a charge is made for the use of the Colegio's facilities, because of the continuous nature of these activities and the widespread publicity given to the fact that they take place in the Colegio's premises, a general impression is given that the Colegio is somehow associated in an active manner with at least some of these activities. This general impression is buttressed by the nature of the resolutions approved by the Board to which we have previously alluded, many of which in fact appear to complement the above-mentioned activities. The Colegio's total failure to disavow its sponsorship of the activities held within its premises does nothing to dissipate this impression.

(4) The Colegio also sponsors various publications. These include a law review, a monthly news letter[15] and the miscellaneous reports of its various committees. Several resolutions and proceedings of the Board of Governors and of the general assembly, of an ideological or political nature, have been published in the Colegio's law review,[16] a publication which receives wide dissemination in and outside Puerto Rico. Additionally, the law review publishes some articles which can only be cataloged as political or ideological rhetoric, with little, if any, relationship to the workings of a law journal.[17] The

[14] The charging of a fee for the use of the Colegio's facilities is at the discretion of the Colegio's president. See Plaintiffs' Exhibit 3 at p. 8. In some of the above mentioned activities, fees of between $100-$300 were charged.

[15] "Factum"

[16] See Footnote 8 herein. See also 34 *Rev. Col. Ab. P.R.* 515-530 (1973); "Informe sobre los Asuntos Acontecidos en la Universidad de Puerto Rico Recinto de Rio Piedras Durante la Huelga Estudiantil en esa Institucion," 43 *Rev. Col. Ab. P.R.* 527-563 (1982).

[17] See Mari Bras, "La Jornada de 1978 en Naciones Unidas" 42 *Rev. Col. Ab. P.R.* 535 (1981); Correa Benitez "Semblanza de Juan Antonio Corretjer", 42 *Rev. Col. Ab. P.R.* 1 (1981); Aponte Vazquez, "Necator Americanus: Sobre la Filosofia del Caso Rhoads", 43 *Rev. Col. Ab. P.R.* 117 (1982); Marcksoud Lopez and Serrano Garcia, "El Mito de la Democracia: Apuntes Sobre la Cultura Politica Puertorriquena", 43 *Rev. Col. Ab. P.R.* 359 (1982). It should be noted that none of the Colegio's publications contain any disclaimer, as is common in the publications of many professional associations, to the effect that material published in its publications is not the official position of said organization unless specifically adopted thereby, or words to said effect. For

monthly news letter is also used to disseminate the resolutions of the Board of Governors, some of which as previously indicated, have a strong ideological or political content.[18] The program for the annual general assembly is also a source of publicity for ideologically-tainted resolutions,[19] and is used as well for other proselytizing purposes.[20]

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example, the "American Bar Association Journal" indicates in its publication: "As it is one objective of the *American Bar Association Journal* to be a forum for the free expression and interchange of ideas, the opinions and position stated in signed material are those of the authors and not by the fact of publication necessarily those of the American Bar Association or the *Journal*" See 69 *ABA Journal* 550 (May, 1983); 37 *The Business Lawyer* (back page) (April, 1982).

[18] See Plaintiffs' Exhibit 251, various copies of "Factum".

[19] See Plaintiffs' Exhibit 6a-6d.

[20] See Plaintiffs' Exhibit 6a. The cover page of this program is dedicated to Emeterio Betances, a deceased independence leader (See back page of Exhibit 6a). In the President's message, at page 5, then president Graciany Miranda Marchand states that "the Colegio has returned to its position in the vanguard leadership of Puerto Rico society. We have not refused to be involved in controversy nor have we remained neutral nor indifferent, on the contrary, the Colegio has contributed to the discussion of the problems which ail our people."

See also Plaintiffs' Exhibit 6b, p. 1. Here the annual assembly of the Colegio is dedicated to Pedro Albizu Campos, the leader of the Nationalist Party which has brought about various violent activities in Puerto Rico (ex. the Nationalist Revolt in 1950) and in the Mainland (ex. the attack on Blair House and Congress in 1952). The President's message, again makes a point of indicating the Colegio's "unquestionable leadership . . . in the discussion and defense of the public matters which affect our Homeland." *Id.*, p. 5.

In Plaintiffs' Exhibit 6c, the cover page of the general assembly program and the general assembly itself, are dedicated to paying homage to the people of Vieques, with whom the Colegio is said to "have a firm and unbreakable obligation of solidarity in its fight" against the U.S. Navy. The message by then president Angel Tapia Flores was no less eloquent in stating what he considered to be the issues at hand: " [T]he People of Puerto Rico and all our legal profession have felt the presence of the Colegio, from Vieques to Washington. To date, there has not been one significant issue generated in this country as to which the Colegio de Abogados de Puerto Rico has failed to advise and illustrate our people. It would be difficult indeed to make a list of all these matters. You know them and the People of Puerto Rico know them, and that's good enough for us." *Id.* p. 5. And "that" is what *this* case is about!

See also the President's message at page 5 of Plaintiffs' Exhibit 6d, where among other things, it is said that "the militant participation of our Colegio

Related to the above are the various committees and commissions of the Colegio.[21] These groups issue reports on matters, including ideological and political issues, many of which have been the basis of the resolutions previously referred to herein.[22] Many of these reports have been independently published by the Colegio, and their contents have received wide publicity and circulation throughout the Colegio membership and the general public.

(5) The Colegio has appeared either through testimony or by written briefs, before Congressional committees and before committees of the Legislature of Puerto Rico to present institutional views on behalf of the Colegio membership regarding pending legislation and other matters of a political and/or ideological nature. Examples of these activities include appearances before Congressional Committees considering legislation dealing with migrant farm workers, and similar appearances to oppose legislation to increase the number of District Judges in the United States District Court for Puerto Rico.[23] Colegio President Tapia Flores also appeared in person before a committee of Congress considering the enactment of Spanish language legislation for the U.S. District Court in Puerto Rico. On a second occasion he appeared before a committee investigating Naval activities in Vieques. Colegio President Negron Garcia appeared before the Puerto Rico Legislature to con-

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aimed at eliminating the military bases of the North American Navy from our National territory in Vieques produce in us a feeling of happiness, satisfaction and hope."

[21] The permanent committees are provided for in the by-laws of the Colegio, which also grant the president or the Board of Governors the authority of creating special committees. See Article 44, Plaintiffs' Exhibit 5. The members of all committees are named by the president of the Colegio.

[22] See for example: "Informe de 1980-Factores Exteriores que afectan el Sistema Constitucional de Puerto Rico", of the "Comision Para el Estudio del Sistema Constitucional de Puerto Rico", Plaintiffs' Exhibit 245; "Informe Sobre el Derecho Constitucional a Fianza", of the Civil Rights Committee, Plaintiffs' Exhibit 253; see also the various committee reports in Plaintiffs' Exhibit 251.

[23] As can be seen from Plaintiffs' Exhibit 46, the opposition to this legislation was strictly based on ideological grounds.

desmn the Electoral Law of Puerto Rico, and to state the Colegio's position as to "what the electoral process in a democracy should be."

There is no question but that in the carrying out of the above mentioned ideological and/or political activities the funds, resources and facilities of the Colegio have in varying degrees been used to support and promote said activities. Furthermore, there is no way of determining, from an accounting standpoint,[24] the dollar amount of this support except to conclude that from the pervasiveness, scope and breadth of this type of activity, it is obvious that the backing has been and is considerable.

The above findings are almost superfluous, as the Colegio hardly denies that it engages in ideological activities. In its Post-Trial Memorandum the Colegio states: "The Colegio de Abogados is an entity designed with a pluralistic purpose not as a private club or fraternity immersed only in the defense of its class interest."[25] It continues to expound that: "[T]he Colegio has an unquestionable value that goes beyond the narrow interest of lawyers as a class, to benefit the good administration of justice and the social advancement of the community. This value resides in the special function the Colegio plays together with other similar professional associations, in providing independent voices to participate and strengthen our democratic way of life."[26] It argues that: "[I]t is also proper, for the state to request from the organized bar reports and advice on such areas of great public importance where lawyers because of their training and experience, are especially fitted to evaluate the same."[27] Furthermore, it is the position of the Colegio that it can and will continue to engage in ideological activities,[28] a position which is hardly discouraged by the Supreme Court of Puerto Rico's decision in *Colegio de Abo-*

[24] Testimony of Juan Espiet, the Colegio's Auditor.
[25] Colegio's Post-Trial Memorandum, at p. 25.
[26] *Id.*, p. 44.
[27] *Id.*, p. 47.
[28] See the testimony of Colegio President Arturo Negron Garcia.

gados de Puerto Rico v. *Schneider, et al.*, 112 D.P.R. (1982), 82 JTS 51, wherein it states, after harking back to the philosophical roots of the Colegio as laying in the bar associations of France and Spain where " . . . the Bar's role was, from time immemorial, a primarily political one,"[29] that "[i]n the case of Puerto Rico, the [Colegio] need not be a quiet and blushing entity, afraid to use the voice granted to it by the very pluralistic purpose it should serve . . ."[30] Finally we have, that although Plaintiffs' complaints charge the Colegio with engaging in "ideological and partisan" activities[31], Colegio's denial is limited to "partisan" activities only.[32]

We conclude this part of our opinion by saying that if one thing is clear in this case, it is the proliferation of Colegio's ideological and/or political activities. We thus pass on to our next point of inquiry.

State Action in the Support of Colegio's Ideological and Political Activities.

The Colegio admits to being "a quasi-public corporation created by the Legislature of Puerto Rico to perform functions vested with a great public interest".[33] Although in a slightly different context, the Court of Appeals for the First Circuit recently stated in *Piper* v. *Supreme Court of New Hampshire*, 708 F.2d 825 (CA-I, 1983), that:

> "The relationship between control over state bar membership and a state's ability to function as a sovereign political body is very close. The bar is a vital component

[29] See 82 JTS 51 at p. 2524.

[30] *Id.* That decision is itself a recognition that the Colegio engages in ideological activities. *Id.* 82 JTS at p. 2525.

[31] See Plaintiffs Schneider's and Ramos' Complaint (Case No. 82-1459) Paragraphs 25E, 26 and 33.

[32] See Answer at Paragraphs 3 and 5.

[33] See Colegio's Post-Trial Memorandum, p. 24. See also Section 1 of Law 43 (4 L.P.R.A. 771).

> of the state judiciary which, together with the executive and legislative branches, constitutes an essential ingredient of state government. Although not state employees, lawyers have long been considered officers of the Court. This designation does not refer to the fact that lawyers are officials capable of exercising judicial powers, but rather to the fact that lawyers are closely associated with, and have important responsibilities to a state's court." (At p. 830, citations omitted)

Law 43, which we know establishes the integrated bar of Puerto Rico, charges the Colegio with the duty of "cooperat[ing] in the improvement of the Administration of Justice [and] to render such reports and give such advice as the Government may require of it." 4 L.P.R.A. 772(1), (2). Additionally, the Colegio has the power, subject to the approval of the Supreme Court of Puerto Rico, "[t]o adopt and establish . . . the rules of professional ethics that shall govern the conduct of lawyers," as well as to receive and investigate complaints, and "institute proper disbarment proceedings" before the Supreme Court. 4 L.P.R.A. 773(f), (g). Further intertwining the Colegio's role with that of the courts, the Supreme Court of Puerto Rico has long insisted, and frequently reiterated, its inherent power to regulate the legal profession, at times with the Colegio acting as the prosecutor. *Colegio* v. *Schneider*, *supra*; *In re Liceaga*, 82 P.R.R. 245, 248 (1961); *In re Andreu*, 81 P.R.R. 87, 117 (1959); *In re Pagan*, 71 P.R.R. 712, 714 (1950); *In re Abella*, 67 P.R.R. 211, 219 (1947); *In re Gonzalez*, 65 P.R.R. 357, 367 (1945); *In re Bosch*, 65 P.R.R. 232, 234 (1945); *In re Arroyo*, 63 P.R.R. 764, 766 (1944); *Guerrero* v. *Court of Tax Appeals*, 60 P.R.R. 236, 244-247 (1942); *Ex Parte Jimenez*, 55 P.R.R. 51 (1939); *In re Tormes*, 30 P.R.R. 248 (1922). And in the present case, of course, we have the additional factor that some Plaintiffs, in addition to being lawyers are also notaries, a position highly embued with the state's imprimatur.[34]

[34] In Puerto Rico only lawyers admitted to the practice of law can be notaries. 4 L.P.R.A. 1002. In a Civil Law jurisdiction such as Puerto Rico,

But the state action which supports the Colegio goes much farther than merely requiring mandatory membership in the Colegio as the *quid pro quo* to the practice of the legal-notarial profession in Puerto Rico. 4 L.P.R.A. 774, 1002. The Commonwealth of Puerto Rico provides financial support to the Colegio to an extent and in a manner unprecedented within any other jurisdiction in the United States. Not only does Law 43 provide for the mandatory payment of dues to the Colegio,[35] with suspension from the practice of law for non-payment thereof,[36] but it also requires that each lawyer, upon filing his first document in any judicial proceeding before the Commonwealth courts, must cancel and attach to said document a "forensic stamp" as a condition precedent to such filing.[37] Additionally, a "notarial stamp" must be affixed to the original and all certified copies of all public instruments executed by a notary-lawyer, without which said document is "considered null for all purposes."[38] Although the Commonwealth's offices of collection of internal revenue provide the

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notaries perform functions of a much more far-reaching nature than that of notary publics in Common Law jurisdictions. They are more than mere oathtakers. They perform highly important duties with regard to the validation and authorization of all kinds of public instruments under the Civil Law, such as deeds, wills, powers of attorney, etc. See 4 L.P.R.A. 847-858, 881-895, 921-927, 1001-1040. Although they are not considered public officers as such, they exercise public functions. *People* v. *Central Cambalache*, 62 P.R.R. 530 (1943); *In re Melendez Perez*, 104 D.P.R. 770, 775-776 (1976). Cf. *Piper* v. *Supreme Court of New Hampshire*, *supra*. As Colegio states in its Post-Trial Memorandum: "A lawyer who chooses to become a notary public becomes a functionary of the Commonwealth of Puerto Rico and when he acts as such notary public exercises state powers: he acts in a public capacity and not as a private citizen." See footnote at page 49 of the Colegio's Post-Trial Memorandum.

[35] 4 L.P.R.A. 780.

[36] 4 L.P.R.A. 781. Practice during the suspension for non-payment can lead not only to contempt of court charges, *Bar Ass'n of Puerto Rico* v. *Fajardo*, 51 P.R.R. 512 (1937), but also to criminal prosecution. 4 L.P.R.A. 782.

[37] 4 L.P.R.A. 783; *Lopez Rivera* v. *Matos*, 101 D.P.R. 740 (1973).

[38] 4 L.P.R.A. 1006. Failure to comply with this requirement will also subject the notary-lawyer to disciplinary action before the Supreme Court and will prevent, in the case of a deed, registration in the Registry of Property. Cf. *Rosario* v. *Registrar*, 65 P.R.R. 436 (1945).

facilities for the sale of these "bar stamps, notarial stamps, or any other special stamps adopted and issued by the [Colegio]", the *entire* proceeds of said sales are remitted by the Secretary of the Treasury to the Colegio, for its use, without restriction except that "at least, one third of the total resources received [from the notarial stamps must be devoted] to community service programs such as free legal assistance to indigent persons, continuous community legal education programs, and other analogous programs."[39]

[1] State action is sufficient for Section 1983 purposes where the state and the entity in question maintain a sufficiently interdependent or symbiotic relationship, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), where the state requires, encourages or is otherwise significantly involved in the questioned conduct, *Lombard* v. *Louisiana*, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1961), or where the entity exercises a traditional state function. *Smith* v. *Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Marsh* v. *Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). See also *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Downs* v. *Sawtelle*, 574 F.2d 1 (CA 1), *cert. denied* 439 U.S. 910, 99 S.Ct. 278, 58 L.Ed.2d 256 (1978); *Rivas Tenorio* v. *Liga Atletica Interuniversitaria*, 554 F.2d 492 (CA 1 1977). *Jackson* v. *Statler Foundation*, 496 F.2d 623 (CA 2 1974); *Ludtke* v. *Kuhn*, 461 F.Supp. 86 (S.D.N.Y. 1978); *Stewart* v. *New York University*, 430 F.Supp. 1305 (S.D.N.Y. 1976); *Rackin* v. *University of Pennsylvania*, 386 F.Supp. 992 (E.D.Pa. 1974). In *Jackson* v. *Statler Foundation*, *supra*, the Court summarizes:

[39] 4 L.P.R.A. 785, 1006. Cf. Article 59 of Colegio's by-laws. Plaintiffs' Exhibit 4. In considering the extent of the Commonwealth's involvement in the Colegio's affairs, it is interesting to note that 4 L.P.R.A. 785(b) provides:

> "That pending the liquidation and reimbursement of the total value of the stamps delivered to the Secretary of the Treasury, the proceeds from the stamps sold, as well as the stamps still unsold, shall be considered, for all purposes to be of the same character and condition as securities of the Commonwealth of Puerto Rico, in the possession of the Secretary of the Treasury."

"A review of the 'state action' case law suggests five factors which are particularly important to a determination of 'state action': (1) the degree to which the 'private' organization is dependent on governmental aid: (2) the extent and intrusiveness of the governmental regulatory scheme: (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which [it] serves a public function or acts as a surrogate for the state; (5) whether the organization has legitimate claims to recognitions as a 'private' organization in associational or other constitutional terms.

Each of the factors is material, no one factor is conclusive." See 496 F.2d at 629.

The Colegio clearly meets at least four of these five criteria. The Colegio's dependency on governmental aid, both in terms of the mandatory membership dues and as provided by the forensic and notarial stamps, is almost exclusive. Secondly, the government's regulatory scheme is all pervasive. Thirdly, that the Colegio serves a public function, at the very least in its prosecutorial activities in helping to regulate the legal profession, cannot be questioned. Fourth, both the Colegio and Law 43 refer to the Colegio as a "quasi-public" entity, a description which is not merely a figure of speech, but which the facts bear out.

[2] The Colegio's symbiotic relationship to the various[40] branches of the Commonwealth's government can only lead us to conclude that its actions are permeated with the "color of law." We thus hold that the Colegio's ideological and political activities as previously described herein, are state action within the meaning of 42 U.S.C. § 1983. See *Arrow* v. *Dow*, *supra*; Cf. *Dist. of Col. Court of Appeals* v. *Feldman*, *supra*.

Nor do Defendants seriously contest this issue. The gravamen of their opposition, apart from the preliminary

[40] In fact to all the branches: Judicial, Legislative and Executive.

questions previously decided by the Court,[41] are concerned with the *consequences* of this state action, a matter which we will now discuss in detail.

The Consequences of the Colegio's Ideological and/or Political Activities

[3] It is well established that it is a violation of an individual's First and Fourteenth Amendment rights for the state to coerce support of ideological and/or political causes. *Abood* v. *Detroit Board of Education*, *supra*; *Arrow* v. *Dow*, *supra*; Cf. *Galda* v. *Bloustein*, 686 F.2d 159 (CA 3, 1982). Whatever else *Abood's* diverse opinions may stand for, the Court was unanimous in holding that the use of mandatorily required fees for ideological and/or political purposes violated the First Amendment interests of persons to be free "to associate for the advancement of ideas, or to refrain from doing so, as [they] see fit."[42] In fact the Court quoted Thomas Jefferson to the effect that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." 431 U.S. at 234-235, n.31, 97 S.Ct. at 1799, n.31.

The *Abood* decision bears further scrutiny. In *Abood* the Court held that public school teachers could not be compelled to support the political activities of a union to which they were required to belong by virtue of a state law. *Abood* also held that it was not incumbent upon the dissenting individual to have to object to the disputed activities nor to have to prove how much was spent on these activities by the union.[43] The plurality opinion stated that it favored an internal voluntary

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[41] See 546 F.Supp. 1251.

[42] 431 U.S. at 222-223, 235-236, 97 S.Ct. at 1792-1793, 1799-1800 (Stewart, J. plurality opinion); *Id.* at 243-44, 97 S.Ct. at 1803-1804 (Rehnquist, J., concurring); *Id.* at 244, 97 S.Ct. at 1804 (Stevens, J. concurring); *Id.* at 244-45, 97 S.Ct. at 1804 (Powell, J., concurring). Cf. *Galda* v. *Bloustein*, 516 F.Supp. 1142, 1148, 1150 (D.N.J., 1981) reversed 686 F.2d 159 (CA 3, 1982).

[43] 431 U.S. at 238-241, 97 S.Ct. at 1801-1802.

plan whereby objectors to legislative activity could obtain a refund of that portion of the dues spent for political purposes, and a reduction of future dues assessments to exclude that portion attributable to political activity.[44] But the Court in *Abood* did *not* provide any remedy as such. Rather it remanded the case for a determination as to whether the voluntary procedure instituted by the union after the litigation ensued, safeguarded the teachers' First Amendment rights.[45] The Court in fact specifically stated that:

> "We express no view as to the constitutional sufficiency of the internal remedy described by the appellees. If the appellants initially resort to that remedy and ultimately conclude that it is constitutionally deficient in some respect, they would of course be entitled to judicial consideration of the adequacy of that remedy." *Id.* 431 U.S. at 242, n.45, 97 S.Ct. at 1803, n.45. See generally, "The Right of Ideological Non-association", 66 *Calif.L.Rev.* 767 (1978); "First Amendment Protection against governmental compelled Expression and Association", *supra*. Cf. *Galda* v. *Bloustein*, *supra*, at page 167.

[4] Nevertheless, the Colegio contends that a procedure created by it after the commencement of this action, pursuant to an order of the Supreme Court of Puerto Rico in *Colegio* v. *Schneider*, *supra*, is an "*Abood* remedy", and as such, is all that Plaintiffs are entitled to as relief, even assuming they show violation of their First Amendment rights.[46]

The Regulation in question[47] was approved by the Board of Governors on November 23, 1982 and distributed to the membership sometime thereafter. This regulation creates the "Board for the Revision of the Activities of the Colegio" (hereinafter called the "Board"), for the purpose of "passing judg-

[44] 431 U.S. at 240, 97 S.Ct. at 1802.

[45] 431 U.S. at 242, 97 S.Ct. at 1803.

[46] See Generally Defendants' Post trial brief at page 64, *et seq.*

[47] Defendants' Exhibit A.

ment on the classification of the activities of the Colegio, the proportions between the ordinary ones and those of an ideological nature, the validity of any objections which a member may have as to any given activity, and over all controversies which may arise regarding the activities of the Colegio."[48] The Board is charged with balancing "the right of freedom of expression of the members of the Colegio who affirmatively express their objections to the activities of the Colegio, at the time of the payment of their dues,"[49] with the "necessity of maintaining a Colegio which is vigorous and faithful to its traditions and historical functions."[50]

The Board is composed of "seven lawyers of recognized prestige selected by the membership of the Colegio."[51] In point of fact, the Board was selected by the Board of Governors, who submitted seven candidates to be voted upon and blank spaces on the ballot for "write-ins".

Article 11 of the Regulation[52] charges the Board with the classification of the Colegio's activities "based on the definition of what is an ideological activity" as per an informative motion filed by the Colegio with the Supreme Court of Puerto Rico on June 25, 1982 in *Colegio* v. *Schneider*, *supra*. The import of that motion is to define as an "ideological activity" only those activities which are related to *partisan politics*.[53]

The Regulation sets up an elaborate and complicated procedure for the challenging of Colegio's activities by its members. Only those members "who at the moment of payment of their annual dues, have affirmatively expressed their objection to the use of their moneys in ideological activities pursuant to the definition that is given to said activities by the Board in coordination with the Board of Governors of the Colegio,"

[48] *Id.*, Article 2.

[49] Which are due by January 31 each year.

[50] *Id.*

[51] *Id.*, Article 3.

[52] *Id.*

[53] See Plaintiffs' Exhibit 32; also the testimony of Colegio's President, Arturo Negron Garcia.

may file a complaint or objection with said Board.[54] The complaint must be filed within 30 days after the activity takes place[55] and must "allege sufficient facts for the Board to grant a remedy."[56] If the Board finds merit in the complaint it will order the "return of the corresponding amount of money to the member who filed the complaint. Additionally, all other lawyers who at the time they paid their dues objected to their use for ideological purposes, shall also be notified. Once notified, they have 30 days within which to file a written claim before the Executive Director of the Colegio for the return of the same proportional amount that was returned to the member who initiated the complaint."[57]

As previously indicated, the Colegio hails this regulation as the panacea to all of Plaintiffs' claims. However, even assuming that there is such a thing as an "*Abood*-type remedy," a contention which a careful reading of *Abood's* multiple opinions puts in serious doubt,[57a] the Colegio's Regulation falls considerably short of the mark and, we are sorry to say, is illustrative of the cynicism and bad faith with which the Colegio has been handling the entire subject matter of the present suits.

To begin with, the Regulation covers only the question of annual dues. It completely ignores the issue of the funds raised through the purchase of forensic and notarial stamps. Apparently the Colegio thinks that the use of those funds for its ideological and/or political activism can continue without proscription. It is mistaken.

Second, by requiring beforehand that a member disclose his disapproval of ideological activities before he can qualify for "relief", the Colegio shows either total disregard or unbelievable callousness as to the membership's right to be free from compelled expression. More than anything else in this case,

[54] Defendants' Exhibit A, Article 12.

[55] *Id.*, Article 13.

[56] *Id.*, Article 14.

[57] *Id.*, Article 17.

[57a] See again 431 U.S. at 242, 97 S.Ct. at 1803. See *Galda* v. *Bloustein*, *supra*, at page 167.

this forced disclosure subjects the protesting member to the chilling effects of being singled out, vis-a-vis his peers, as the price for exercising his First Amendment rights. Furthermore, such a requirement infringes upon the individual's interest in selfhood, which is his freedom to decide how he will present himself to the world. See L. Tribe, *American Constitutional Law*, Sec. 15-5, see generally Secs. 15-1 to 21 (1978). See also *Whalen* v. *Roe*, 429 U.S. 589, 598-600, 97 S.Ct. 869, 875-877, 51 L.Ed.2d 64 (1977); *Roe* v. *Wade*, 410 U.S. 113, 152-154, 93 S.Ct. 705, 726-727, 35 L.Ed.2d 147 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479, 483, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965). See also Gaebler, "First Amendment Protection Against Government Compelled Expression and Association," 23 *B.C.L.Rev.* 995, 1005 (1982). Cf. *Brown* v. *Socialist Workers '74 Camp. Comm.*, ___ U.S. ___, 103 S.Ct. 416, 74 L.Ed.2d 250 (1982). As the Court in *Abood* stated:

> "Disclosure of the specific causes to which an individual . . . is opposed (which necessarily discloses, by negative implication, those causes the [individual] does support) may subject him to 'economic reprisal, . . . threat of physical coercion, and other manifestation of public hostility, and might dissuade him from exercising the right to withhold support because of fear of exposure of [his] beliefs . . . and of the consequences of this exposure." (citations omitted) 431 U.S. at 241, n.42, 97 S.Ct. at 1802, n.42.

The Court quotes from Justice Jackson's famous statement in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1942):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by*

word or act their faith herein." (emphasis supplied) 431 U.S. at 235, 97 S.Ct. at 1799.

Third, the procedure established by the Regulation does not safeguard the rights of the dissidents. To begin with, the Board is a "captive organization," composed of "lawyers of recognized prestige," whatever that means, but in fact is named by the very group it is supposed to police,[57b] the Board of Governors, with whom it must "coordinate" its ideological definitions. Well, we know what *that* means. Next, the procedure is obviously set up to discourage the non-believers. They must object beforehand and then are required to keep abreast of everything happening in the Colegio's diverse internal and external activities so that they can detect objectionable conduct[57c] and file a protest within a specified time frame. Then, after an elaborate hearing they may receive reimbursement in accordance with a vague "proportional" formula. In the meantime, the Colegio has used the dissident's money and has not even indicated to the general public the existence of such dissidence. In fact, all that the dissidents get for their troubles in exposing their dissident is the right to be ever vigilant for the opportunity to engage the Colegio in bureaucratic shadow-boxing.

Fourth, we must consider the Regulation in the light of the Colegio's definition as to what constitutes ideological activity, which it understands to be limited to mean, "partisan politics."[58] This, of course, is totally unacceptable and runs contrary to even the vague definition of "political activity" contained in *Abood*.[59] See also *Arrow* v. *Dow*, *supra*. Cf. *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d

[57b] The procedure resulted in the election of the Board of Governors' seven candidates. See Defendants' Exhibits A (Article III) and E.

[57c] A burden that the Court rejected in *Abood*. See 431 U.S. at 241, 97 S.Ct. at 1802.

[58] See Footnote 53a.; Cf., Footnote 5a.

[59] Which defines political activism as any attempt to influence governmental policy-making. 431 U.S. at 231, 97 S.Ct. at 1797. See Footnote 5a regarding problems related to defining "ideological" and "political" activities.

1191 (1961); *Wooley* v. *Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); Cf. *Galda* v. *Bloustein*, *supra*.

Last but by no means least, we must point out the differences between the situation before the Court in *Abood* and that faced by us here. To begin with, the state law in *Abood* permitted public employee unions, whereas here the state law actually *creates* the organization in question. Next, in *Abood* the questioned fee was negotiated freely between the union and the state-employer; here the *law itself* makes payment of Colegio's dues mandatory. Additionally, in *Abood* there was no direct financial support of the union by the state; here there is *direct and massive* financial support of the Colegio by way of mandatory dues and forensic and notarial stamps. Furthermore, in *Abood* the teacher did not have to belong to the union, but merely pay his fees; here you *must belong* to the Colegio in order to be a notary and to practice law. And lastly, in *Abood* there was no governmental enforcement machinery as such, but rather there was a contractual remedy, albeit permitted by the state; here it is the *government's enforcement* machinery that coerces membership in and financial support of the Colegio.

Abood and the present situation are light-years apart. We find it difficult to believe that, if faced with the present case, the Supreme Court of the United States would not distinguish *Abood* from the present case.

For all these reasons we conclude that the Colegio's Regulation does not in any way relieve the Colegio of the violations of 42 U.S.C. § 1983 which it committed and continues to commit. Furthermore, this Court considers that this Regulation is a sham, designed to forestall the adjudication of this case and the remedies to which Plaintiffs are entitled under the Laws and Constitution of the United States.

We have concluded that the Colegio engages in ideological and political activities in violation of Plaintiffs' Civil Rights. We must now determine the appropriate remedy to vindicate these wrongs.

The Remedy

Plaintiffs in this case urge us to declare the unconstitutionality of Law 43[60] creating the Colegio as an integrated bar, as well as that of the stamp acts (Law 11, 99, Law 115, Law 198),[61] and to enjoin the future enforcement of these statutes. Plaintiffs also seek damages against the Colegio.

[5] Based on the present-day state of the law, we cannot say that the general scheme promoted by these statutes is *on its face* unconstitutional. *Lathrop* v. *Donohue*, *supra*. *Lathrop's* multi-opinioned decision is generally cited for the proposition that mandatory bar membership is constitutional, a rule which we are bound to accept. Although Puerto Rico has gone farther than any other jurisdiction known to us in supporting its integrated bar, the wisdom of this support is not for us to pass upon, but rather rests upon the Legislature and Supreme Court of Puerto Rico.

We are not bound, however, to accept the cold letter of these statutes as reflecting the true facts of life. As shown, the longstanding, pernicious and massive ideological and political practices, which have until recently been tolerated *sub silentio* and which are presently encouraged by the very state agencies charged with control and regulation of the integrated bar, present a very different picture as to how Law 43 and the related statutes are actually administered. These practices, we have held, are clearly unconstitutional. Such flagrant violations of the civil rights of Plaintiffs cannot be allowed to continue if *their* constitutional rights have any worth other than one of purely academic value. Without question, these violations of Plaintiffs' speech and associational rights cause them irreparable injury as to which there is no adequate remedy at law. See *Elrod* v. *Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1975). They affect Plaintiffs' means of earning their livelihood in their chosen profession, and require that the

[60] 4 L.P.R.A. 771 *et seq.*

[61] 4 L.P.R.A. 301 et seq.; 4 L.P.R.A. 785; 4 L.P.R.A. 1001 *et seq.*; 30 L.P.R.A. 2001 *et seq.*

Court, in the protection of their rights and because of the magnitude of these violations, exercise its equitable powers to its fullest extent to prevent further violations by Defendants.

[6] In view of the above and the findings and conclusions of this Court, we must forcefully declare that Sections 3, 4, 10 and 11 of Law 43, that all that part of Section 6 dealing with the notarial stamp in Law 99, as well as similar language in Section 38 thereof, and that all of Law 115, *as interpreted, as enforced and as applied*, violate the speech and associational rights guaranteed by the First Amendment of the Constitution of the United States and are contrary to either the Fifth or the Fourteenth Amendments[62] of said Constitution.

It is thus appropriate that until such time as the Colegio ceases to engage in ideological and/or political activism, all Defendants, except the Justices of the Supreme Court of Puerto Rico,[63] their agents, employees, subordinates, and all persons over whom control may be exercised by Defendants:

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[62] See *Examining-Board* v. *Flores de Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976).

[63] In its opinion regarding a writ of mandamus requested by the Justice in this case, the Court of Appeals stated *(See In Re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23-24 (CA 1, 1982) (citations omitted)):

> "... [A] court should not enjoin judges from applying statutes when complete relief can be afforded by enjoining all other parties with authority to seek relief under the statute. Indeed, it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion. In any event, there is no relief-related basis for including the judges in this law suit.
>
> ....
>
> .... The Commonwealth Supreme Court has long claimed an *inherent* disciplinary power over members of the bar, including the power to discipline attorneys for causes other than those enumerated by statute. Moreover, the Supreme Court has asserted the general power to initiate a disciplinary proceeding itself, regardless of the involvement of the Colegio or the Secretary of Justice. Insofar as the plaintiffs direct their claims against the exercise of this disciplinary power, they are suing the Justices as 'enforcers' rather than as 'adjudicators.'
>
> A review of the way in which the judges have exercised their enforcement power, however, makes clear that there is virtually no likelihood that this nonstatutory power could, or would, ever be exercised

(1) Be enjoined from prosecuting or taking any action against any member of the Colegio for failure to pay, directly or indirectly, any due or fee prescribed by any law, regulation or practice of the Commonwealth of Puerto Rico or the Colegio;

(2) Be enjoined from denying or affecting the right of any person, otherwise duly qualified, to practice law and/or engage in notarial practice by reason of their failure to pay any due or fee to the Colegio which may be prescribed by any law, regulation or practice of the Commonwealth of Puerto Rico or the Colegio; or by reason of their refusal to be members of the Colegio;

(3) Be enjoined from selling any forensic or notarial stamp on behalf of the Colegio, or from using any public facility or proceeds of any public funds collected on behalf of or for the Colegio, including but not limited to the sale of forensic or notorial stamps;

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to enforce the membership and dues requirements at issue here. The Justices' attorneys have assured us that this power is exercised only with respect to attorney misconduct that occurs in proceedings before the Supreme Court itself . . . *Should the plaintiffs succeed in setting aside the statutes, nonpayment of dues or refusal to join the Colegio would not constitute misconduct. There is thus no reason to believe that the Justices would penalize any such activity.*" (Emphasis supplied in this paragraph).

The Court of Appeals, on the basis of this finding, proceeded to hold that Plaintiffs had failed to state a claim against the Justices in their enforcement capacity *as to the membership and dues issues* and, because said conclusion was so influenced by Article III-type jurisdictional considerations, the Court issued a writ dismissing said claims as to the Justices. The Court went on to state, however:

". . . The Justices' Article III position with respect to [the forensic and notarial stamp] claims, however, may be different, for here the Justices, and particularly the Chief Justice, may occupy a special administrative position. *See* 4 L.P.R.A. Sec. 1038. The Plaintiffs have a plausible argument that they are suing the Justices in their 'administrative' rather than their 'adjudicative' capacity. If the Justices believe the contrary, they must make their argument first in the district court." *Id.* 695 F.2d at 25.

(4) Be enjoined from denying full legal validity to any pleading, public instrument or deed by reason of the failure of any person to adhere thereto and/or cancel therein any forensic or notarial stamp.

[7] The remaining question, which is the claim for damages, is limited to Plaintiffs Oreste V. Ramos, Romany and Souss. There is no question but that the Colegio's actions have caused these Plaintiffs damages and that the Colegio's bad faith qualifies these damages for recovery pursuant to 42 U.S.C. § 1983. The problem, however, lies with a determination as to the amount to which said Plaintiffs are entitled. The evidence is too vague for the Court to establish through anything other than speculation, the amount of damages suffered by these Plaintiffs. Such conjecture would be contrary to good legal practice and is thus rejected. In view thereof, Plaintiffs Ramos, Romany and Souss are awarded nominal damages in the amount of $1.00 each against the Colegio.

Judgment granting a Declaratory Judgment, Permanent Injunction and Damages in accordance with this opinion shall issue forthwith. The findings of fact and conclusions of law appended hereto shall supplement this Opinion.

IT IS SO ORDERED.

Declaratory Judgment, Permanent Injunction and Judgment of Damages

In accordance with the opinion, findings and conclusions entered today by this Court, it is hereby ORDERED, ADJUDGED and DECREED:

(1) That Sections 3, 4, 10 and 11 of Law No. 43 of May 14, 1932, as amended, of the Commonwealth of Puerto Rico (4 L.P.R.A. 774, 775, 781, 783), as interpreted, enforced and applied are hereby declared to be violative of the First Amendment and of the Fifth or Fourteenth Amendments to the Constitution of the United States;

(2) That Section 6 of Law No. 99 of June 27, 1956 of the Commonwealth of Puerto Rico (4 L.P.R.A. 1006), commencing with that part of the second sentence of the section which reads "and a stamp to be adopted" and continuing through the end of said section, as interpreted, enforced and applied is hereby declared to be violative of the First Amendment and of the Fifth or Fourteenth Amendments to the Constitution of the United States;

(3) That Section 38 of Law No. 99 of June 27, 1956 of the Commonwealth of Puerto Rico (4 L.P.R.A. 1038), where it reads "as well as the proper bar stamps of the Bar Association of Puerto Rico," as interpreted, enforced and applied is hereby declared to be violative of the First Amendment and of the Fifth or Fourteenth Amendments to the Constitution of the United States;

(4) That Law No. 115 of May 6, 1941 of the Commonwealth of Puerto Rico (4 L.P.R.A. 785), as interpreted, enforced and applied, is hereby declared to be violative of the First Amendment and of the Fifth or Fourteenth Amendments to the Constitution of the United States;

(5) That until such time as Colegio de Abogados de Puerto Rico cease to engage in ideological and/or political activism, all Defendants, except the Justices of the Supreme Court of Puerto Rico (see *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23, (CA 1, 1982)), their agents, employees, subordinates, and all persons over whom control may be exercised by said Defendants are hereby enjoined and prohibited forthwith from:

(a) Prosecuting, harassing or in any manner taking action against any person licensed to practice law, including notarial law, for failure to pay directly or indirectly any due or fee prescribed by any law, regulation, practice or custom of the Commonwealth of Puerto Rico or of the Colegio de Abogados de Puerto Rico.

(b) Selling any forensic or notarial stamp on behalf of the Colegio de Abogados de Puerto Rico, or from using any public

facility or resource for said purposes, or from forwarding to the Colegio de Abogados de Puerto Rico the proceeds of any funds collected on its behalf but not transferred to it as of the date of this order;

(c) From denying full legal validity to any pleading, public instrument or deed by reason of the failure of any person to adhere thereto, and/or cancel therein, any forensic or notarial stamps; and

(d) From denying or affecting the right of any person, otherwise duly qualified to practice law and/or engage in notarial practice by reason of their failure to pay any due or fee to the Colegio de Abogados de Puerto Rico, or by reason of their non-membership in said organization, or by reason of the failure or refusal of said person to purchase and use, in the relevant pleading or public instrument, any forensic or notarial stamp.

(6) That the Colegio de Abogados de Puerto Rico pay the sum of one dollar ($1.00) each to:

(a) Oreste V. Ramos

(b) Jorge F. Romany

(c) Jorge Souss

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 16th day of June, 1983.

APPENDIX

Supplementary Findings and Conclusions

1. All Plaintiffs are citizens of the United States, citizens and residents of the Commonwealth of Puerto Rico and were duly licensed and admitted to practice law and to act as notaries in said Commonwealth of Puerto Rico. Plaintiffs Oreste V. Ramos, Jorge F. Romany and Jorge Souss are all still actively engaged in the practice of law. Oreste Ramos and Romany are also licensed to act as notaries. Plaintiffs Hector R. Ramos and Robert E. Schneider were actively engaged in

the practice of law, the first until his appointment as Secretary of Consumer Affairs and the second until his suspension, on June 3, 1982, by the Commonwealth Supreme Court for the non-payment of dues to the Colegio. Hector Ramos and Schneider both acted as notaries until their suspension as such by the said Court on June 3, 1982. Plaintiff Jorge Souss voluntarily withdrew from notarial practice in 1977.

2. The Colegio is a juridical entity organized as a quasi-public corporation in 1933 pursuant to the provisions of Law 43.

3. Defendants Secretary of Justice and Secretary of the Treasury, are the officers appointed by the Governor of Puerto Rico pursuant to Section 5 of Article IV of the Commonwealth Constitution to head the Departments of Justice and Treasury, respectively, two of the executive departments of the Commonwealth established pursuant to Section 6 of said Article IV.

4. Defendant Jose Trias Monge, is the Chief Justice and Defendants, Carlos V. Davila, Hiram Torres Rigual, Jorge Diaz Cruz, Carlos J. Irizarry Yunque, Antonio S. Negron Garcia and Francisco Rebollo, are all Associate Justices of the Commonwealth Court.

5. Plaintiffs, and all lawyers licensed to practice law in Puerto Rico, as a condition to their right to continue to practice law, are compelled by Law 43 to be members of the Colegio and to pay such annual dues as may be determined by the Colegio.

6. Plaintiffs, and all lawyers licensed to practice law and engage in notarial practice in the Commonwealth, are compelled by Section 6 of Law 99, to purchase, affix and cancel a notarial stamp issued by the Colegio on the original and every certified copy of each public instrument (deeds, wills, powers of attorney, etc.) authenticated by them as notaries.

7. Plaintiffs, and all persons licensed to practice law in the Commonwealth, are compelled by Section 11 of Law 43, to purchase, affix and cancel a one dollar ($1.00) forensic stamp issued by the Colegio to the first pleading filed by them as

lawyers in any judicial action or proceeding before the Commonwealth courts.

8. Law 115, requires that the Secretary of the Treasury sell Colegio notarial stamps and Colegio forensic stamps through the offices of the collectors of internal revenue of the Commonwealth, and to reimburse and remit to the Colegio the total amount of the sales made, without making any deductions from the selling price.

9. In accordance with Sections 28 and 38 of the Notarial Law (Law 99) (4 L.P.R.A. 1028, 1038) the original of every public instrument must be kept in a protocol in the office of each notary and is subject to strict supervision by the Chief Justice of the Commonwealth Supreme Court.

10. Section 38 of Law 99 (4 L.P.R.A. 1038) provides that the Chief Justice shall supervise the inspection of notarial offices and the examination of protocols of all notaries in the Commonwealth to see that all applicable laws have been complied with and that the proper Colegio stamps are affixed and cancelled on each original public instrument authenticated by said notaries.

11. Section 2 of Act Number 198, adopted on August 8, 1979 by the Legislature, as amended, (30 L.P.R.A. 2001), provides that the Secretary of Justice shall supervise the administration, direction and inspection of the Registries of Property of the Commonwealth.

12. Pursuant to the supervisory duties indicated in Finding No. 11 above, the Secretary of Justice enforces compliance with the provisions of Law 99 that compel lawyers engaged in notarial practice in the Commonwealth to purchase, affix and cancel Colegio Notarial Stamps on public instruments authenticated by them, by refusing to admit certified copies of such deeds to the Registry of Property for recordation unless the corresponding Colegio notarial stamp has been affixed and cancelled thereon.

13. The actions of Commonwealth officials as indicated in Findings Nos. 8, 9, 10, 11 and 12 above constitute state action

in support of the activities of the Colegio within the meaning of the Fourteenth Amendment and 42 U.S.C. § 1983.

14. Article 29(2) of the By-laws of the Colegio provides that one of the duties of the Board is to take action to ensure that no person shall practice before the courts who is not a member of the Colegio and does not comply with the provisions of law or pay the corresponding dues or affix the Colegio forensic stamp to the first pleading filed in any civil or criminal action.

15. Article 36 of the By-laws of the Colegio provides for a Board of Directors composed of a President, the first and second Vice Presidents, Secretary, Treasurer, Assistant Treasurer and Assistant Secretary of the Board. It may be convoked by the Colegio president to take such measures as in his judgment are convenient for the proper operation of the Colegio.

16. Article 37 of the By-laws of the Colegio provides that the president of the Colegio is the official representative of the Colegio and has the power to name the presidents and members of the permanent committees of the Colegio.

17. The president of the Colegio consistently and frequently conducts press conferences to which he invites members of the news media. Normally, the Colegio president conducts a press conference after each Board meeting to announce the resolutions, measures or official positions taken by the Colegio at such meetings.

18. The Colegio is a well known organization and any pronouncement made by it carries great weight in the media and in the opinion of the public, because it ostensibly represents all lawyers in Puerto Rico.

19. The Colegio has repeatedly and consistently affirmed and attested that its primary mission and purpose is not just to limit itself to matters that concern the legal profession and the administration of justice, but to inform, lead, orient and influence the community and society in general. The Colegio contends that it is authorized and empowered by law to bring "truth" to the people, and that it may and will engage in ideological activity.

20. The official position of the Colegio on any matter may be established by a pronouncement, a resolution, a measure or an expression adopted either by its President, its Board or its members at any annual or special meeting.

21. Any official position taken by the Colegio, whether as a result of a pronouncement by its President or action by its Board or its members at an assembly, constitutes the official position of the Colegio on that particular matter. All official positions of the Colegio are claimed and represented to be the position of all of the members of the Colegio, without any mention being made of the existence of any dissent or of any minority or contrary position being held by any of its members.

22. No official position of the Colegio, or resolution or measure of its Board or of its members has ever been approved, authorized or ratified by a majority of all of the members of the Colegio.

23. It is the official position of the Colegio that it will continue to engage in ideological and political activity that is not tied to the struggle of political parties for political power or to partisan politics.

24. The President of the Colegio has periodically appeared before the legislative committees of the United States Congress and of the Puerto Rico Legislature, and before the executive departments of the United States and of Puerto Rico and other bodies, both in and outside of Puerto Rico, to present the official position on the Colegio on various matters of an ideological or political nature.

25. Article 2 Section 2 of the Internal Regulations of the Colegio for the use and lease of its facilities and equipment provides that the Colegio may grant the use of sections of the building, free of charge, to groups or entities for social, cultural, professional and civic activities, including those of a religious or of a partisan political nature.

26. The Colegio has made and continues to make, its facilities, personnel and resources available to political and ideo-

logical groups for political and ideological activity and/or purposes, without charge or for a nominal charge.

27. The Colegio has, to the present taken official stands and positions in the name and on behalf of all of its members, including Plaintiffs, with regard to political and ideological matters.

28. The accounting system presently in use by the Colegio does not allow a determination regarding the cost that is properly allocated to ideological or political activities.

29. All of the official positions, actions and activities of the Colegio, its officers and agents, as well as those carried out through the use of its facilities, personnel and resources are taken and/or carried out under color of the authority granted by Law 43 and constitute state action within the meaning of the Fifth or Fourteenth Amendments and 42 U.S.C. § 1983.

30. The official positions, activities and actions of the Colegio over the past ten years evidence a pattern of conduct by the Colegio to engage in, and to use the facilities, personnel and resources of the Colegio for ideological or political activity without restriction or limitation in the name and representation of all of the members of the Colegio, including Plaintiffs.

31. The Colegio uses, and has used, funds contributed by the payment of compulsory dues and the compulsory purchase of Colegio forensic and Colegio notarial stamps by Plaintiffs Jorge Souss, Oreste V. Ramos and Jorge F. Romany, within the year from the date of their filing of their complaints in this action, to defray the cost of ideological or political activities engaged in by Colegio, and the cost of making Colegio facilities, personnel and resources available to political and ideological pressure groups for such activities.

32. Plaintiff Jorge Souss paid his 1983 Colegio dues on February 5, 1983, but did not make any protest to the use of his dues by the Colegio. Subsequent to that date he received from the Colegio a copy of the Review Board Regulations. He objects to the use of his dues for ideological or political activities but does not want to reveal to what activities he objects. He

paid his dues because it was the only way he could continue to practice law. He knew that if he did not pay he would be suspended and would be criminally liable if he tried to practice law after being suspended.

33. Plaintiff Oreste V. Ramos paid his 1983 Colegio dues on February, 1983, under protest. On June 8, 1982, prior to the filing of his complaint in this action, he tendered payment to the Colegio of his dues for 1982 by a check with a restrictive endorsement, limiting the use of the proceeds to defray the cost of group insurance for members and of printing and mailing the advance decisions of the Commonwealth Supreme Court. The Colegio received this check and issued a receipt for said payment. Subsequently, the Colegio, by letter dated June 8, 1982, returned the check to Oreste Ramos stating that he could make his protest separately but that the Colegio would not accept a check with a restrictive endorsement in payment of dues. By letter dated June 30, 1982 the Colegio again wrote to Oreste Ramos advising him that he owed Colegio dues for 1982 and that his name would be submitted to the Colegio Board on July 10, and that the Board could order that a complaint be filed against him in the Supreme Court of Puerto Rico asking for his suspension for non-payment of dues. Thereafter, on September 21, 1982 Oreste Ramos paid his 1982 Colegio dues by check without restrictive endorsement, but filed a separate letter of protest. Oreste Ramos is in active notarial practice and complains that every time he affixes a Colegio stamp to a deed or to a pleading in court, and every time he pays his annual dues to the Colegio, he feels that he is subsidizing ideological and political activities and propaganda of the Colegio. He testified that during the past year the Colegio had brought Raul Roa, the Foreign Minister of Cuba, to Puerto Rico for a reception at the Colegio, and that he felt he was paying for the reception with the Colegio stamps that he bought and the dues that he paid. He also testified to attendance at several Colegio assemblies where he only attempted to vote once because the assemblies were very disorganized and

like political rallies. The one time that he tried to vote someone kept trying to see him mark the ballot, so he finally voted openly and gave up any attempt to vote secretly. Oreste Ramos objected to the activities of the Colegio, but paid his dues because it was the only way he could continue to practice law. He not only filed an objection as to the use of his compulsory dues for ideological activities, but also objected to the requirement that he reveal his beliefs in order that his objection be considered.

34. Plaintiff Jorge Romany has not yet paid his 1983 dues. He did pay his 1982 dues under protest but only after the Colegio asked for his suspension from legal practice for non-payment of back dues owed to the Colegio. He normally delays payment of his dues until such time as the Colegio makes formal demand for payment. He objects to his compulsory contributions (both as to dues and from the purchase of Colegio stamps) being used by the Colegio for ideological or political activities. He considered that the Colegio has engaged in extensive ideological and political activities. He paid his dues because that was the only way he could continue to practice law and he knew that if he did not pay the Colegio would act to have him suspended from practice.

35. All of the Plaintiffs except Jorge Romany testified that they did not want to have to reveal their individual beliefs in order to be able to practice law. All of the Plaintiffs objected to compulsory membership in, and compulsory contribution to, the Colegio (both by reason of the compulsory payment of annual dues as well as by the compulsory purchase of Colegio stamps) as a condition to their practicing law and acting as notaries so long as the Colegio was authorized and empowered to use its facilities, personnel and resources for ideological and political activities.

36. Plaintiffs Oreste V. Ramos, Romany and Souss have suffered and are suffering mental anguish because they are compelled to be members of an organization which engages in extensive ideological and political activity on their behalf but

contrary to their beliefs. All Plaintiffs are suffering irreparable injuries by virtue of Defendants' actions and no adequate remedy at law is available to repair said injuries.

37. The actions of the Colegio are of a continuing nature.

38. Plaintiffs have stated and proven causes of action pursuant to 42 U.S.C. § 1983. This Court has jurisdiction over these actions by virtue of 28 U.S.C. § 1343.

APPENDIX G

United States District Court
District of Puerto Rico.

Civ. Nos. 82-1459(TR), 82-1513(TR), 82-1514(TR) and 82-1532(TR).

Robert E. SCHNEIDER, JR., et al.,
PLAINTIFFS,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO, et al.,
DEFENDANTS.

AUG. 21, 1987.

Action was brought challenging rules governing integrated bar of Puerto Rico. The United States District Court for the District of Puerto Rico, 565 F.Supp. 963, denied relief and denied stay of judgment, 572 F.Supp. 957. The Court of Appeals, 742 F.2d 32, vacated and ordered abstention until final determination of Supreme Court of Puerto Rico. Following that determination, the District Court, Torruella, Circuit Judge, sitting by designation, held that: (1) res judicata did not bar action; (2) action challenging constitutionality of rule governing integrated bar could be brought in federal court; and (3) case or controversy was presented.

Motion to dismiss denied.

OPINION AND ORDER

TORRUELLA, Circuit Judge, Sitting by Designation.

These cases are again before this court after the period of abstention ordered by the First Circuit. *See Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F.Supp. 963 (D.P.R.), *stay of judgment denied*, 572 F.Supp. 957 (D.P.R. 1983), *vacated*, 742 F.2d 32, 44 (1st Cir. 1984) (ordering this court to abstain until "the Supreme Court of Puerto Rico has finally

determined what remedy to provide or sooner in the unlikely event of some unusual delay"). The Supreme Court of Puerto Rico has issued its final rule governing dissenters' rights in Puerto Rico's integrated bar. *See Colegio de Abogados* v. *Schneider*, 86 J.T.S. 60 (June 26, 1986). Accordingly, this court is poised to exercise its jurisdiction over plaintiffs' federal constitutional challenges to Puerto Rico's integrated bar and the new dissenters' rights rule. The defendant Colegio, however, has filed a motion to dismiss, to which the court must first respond.

Background

Rather than repeat in detail the long procedural history of this case and the history of the mandatory bar association in Puerto Rico, this opinion will merely refer to the numerous published opinions that relate to this case. This general dispute first began when the Colegio brought disbarment proceedings against Robert E. Schneider, Hector Ricardo Ramos Diaz, Jorge F. Romany, and other lawyers who had not paid their mandatory dues to the Colegio. All the attorneys except Schneider and Ramos subsequently paid their dues and were no longer subject to disbarment. Schneider and Ramos were then the subject of an opinion of the Supreme Court of Puerto Rico directing them to pay their dues or be disbarred. *Colegio de Abogados de Puerto Rico* v. *Schneider*, 112 D.P.R. 540 (1982) (hereinafter referred to as the 1982 *Schneider-Ramos* opinion).

The 1982 *Schneider-Ramos* opinion determined the parties' current rights and obligations under the Puerto Rico integrated bar statute and the Puerto Rico constitution. In addition, the 1982 *Schneider-Ramos* opinion announced an impending rulemaking proceeding to reform the Colegio to protect the rights of dissenting members.

Schneider and Ramos refused to pay, notwithstanding the pending rulemaking, and were disbarred. They, along with

the other plaintiffs (who had not been the subject of the 1982 *Schneider-Ramos* decision), then brought this case under 42 U.S.C. § 1983 alleging that Puerto Rico's integrated bar violates their federal constitutional rights. This court dismissed a number of their claims and largely reduced the case to one seeking declaratory and injunctive relief from their prospective obligation to pay dues and belong to the Colegio. *See Schneider* v. *Colegio de Abogados*, 546 F.Supp. 1251 (D.P.R.), *aff'd in part, rev'd in part sub nom., In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982). This court then decided the case on the merits, a decision that was regarded as improvident by the First Circuit in light of the pending rulemaking proceeding in the Supreme Court of Puerto Rico. *See Schneider* v. *Colegio de Abogados*, 565 F.Supp. 963 (D.P.R. 1983), *vacated sub nom., Romany* v. *Colegio de Abogados*, 742 F.2d 32 (1st Cir. 1984).

Now that the rulemaking is completed and the case is back before this court, the Colegio presents three arguments for dismissal. The Colegio suggests, first, that this court lacks jurisdiction because plaintiffs are seeking a review of a decision of the Supreme Court of Puerto Rico. The Bar then argues that, even if this court has jurisdiction, the plaintiffs' claims are precluded by res judicata and collateral estoppel. Finally, they claim that plaintiffs have not presented a case or controversy.

I. *Jurisdiction*

It has long been settled that the federal district courts do not sit in review of state court decisions, even on questions of federal law; the only appeal from a state supreme court decision is to the Supreme Court of the United States. *See Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); 28 U.S.C. § 1257. The Colegio contends that this case falls within *Rooker's* prohibition, because plaintiffs are seeking a review of the Supreme Court of Puerto Rico's *Schneider-Ramos* decision.

This court considered essentially this same issue when this case was first brought in 1982. *See Schneider* v. *Colegio de Abogados de Puerto Rico*, 546 F.Supp. at 1268. At that time the court wrote:

> As to *prospective* enforcement, the [1982] *Schneider-Ramos* decision only serves as a definite interpretation of a state statute by the highest court of Puerto Rico. Thus the consideration by this Court of the issues raised by the *prospective* enforcement of Law No. 43 cannot be interpreted as an appeal from a state court opinion, but is rather a new federal case in which the state court's interpretation serves to establish what is the substantive state law that is applicable.

Id. This ruling, which the defendants did not challenge in their earlier appeal, stands. *See Romany* v. *Colegio*, 742 F.2d at 37 n.6; *see generally* 1B Moore's *Federal Practice* ¶ 0.404[1] (discussing law of the case); 18 Wright & Miller *Federal Practice and Procedure* § 4478 (1981). Since that time, however, the Supreme Court of the United States clarified its *Rooker* doctrine in *D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), and the Supreme Court of Puerto Rico issued a second opinion in *Schneider-Ramos* in 1986. Although neither of these developments has changed the jurisdiction of this court over this case, they merit careful attention.

In review, the 1982 *Schneider-Ramos* opinion held that Puerto Rico's mandatory bar law did not violate free speech and associational rights guaranteed by the Puerto Rico constitution, and that Schneider and Ramos must pay their dues or be disbarred. The court also directed the Colegio to develop a method, following the principles provided by the United States Supreme Court in cases such as *Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), to make sure that the dues of dissenting members such as Schnei-

der and Ramos are not applied to ideological activities. 112 D.P.R. at 550, 556-57. *See also Romany*, 742 F.2d at 35-37. Schneider and Ramos continued to refuse to pay dues and were disbarred.

The Colegio submitted a proposed "remedy" which the Supreme Court of Puerto Rico did not adopt. Instead, the court appointed a special master to conduct evidentiary hearings to provide a basis for the promulgation of its own "remedy." The court issued a temporary "remedy" on November 13, 1984, and later reinstated Schneider and Ramos, who had indicated they would pay dues under the temporary "remedy." The Special Master held the hearings and submitted a report. The Supreme Court then announced in the 1986 *Schneider-Ramos* opinion its, apparently final, "remedy," which established an *Abood*-like rebate procedure.

Before going further, it is important to note what the plaintiffs challenge and what they do not challenge. They do not challenge the Supreme Court of Puerto Rico's individual treatment of either Schneider or Ramos, but rather challenge generally the mandatory bar requirement as it stands after the 1986 "remedy." Schneider and Ramos "do[ ] not question that [the mandatory bar statute and 'remedy'] appl[y] in [their] case, but rather contend[ ] that such [remedy] is unconstitutional in all cases." *Piper* v. *Supreme Court of N.H.*, 723 F.2d 110, 118 n.1 (1st Cir. 1983) (en banc) (Campbell, C.J., and Breyer, J., dissenting), *aff'd*, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1983).

[1] This distinction corresponds to the Supreme Court's distinction in *Feldman* between "challenges to state court decisions in particular cases arising out of judicial proceedings" and "general challenges to state bar rules, promulgated by state courts in non-judicial proceeding." 460 U.S. at 486. Challenges to the former may only be raised in an appeal to the United States Supreme Court, while challenges to the latter may be raised in federal district court in the same manner as challenges to any state statute or regulation. *Id.*

The key *Feldman* concepts relevant here are that of the "judicial proceeding" and the "particular case." If the 1986 "remedy" is the result of a "judicial proceeding" resolving a "particular case," then the federal district courts lack jurisdiction to consider whether it meets federal law requirements.[1] But if the 1986 "remedy" is a general rule, promulgated by the Supreme Court of Puerto Rico in its administrative or legislative capacity as regulator of the attorneys who practice before its courts, then the federal district courts have jurisdiction to consider its constitutionality.

The twist here is that the Supreme Court of Puerto Rico promulgated a new rule as a purported "remedy" to a "particular case," the disbarment action brought against two lawyers who refused to pay dues. In the words of Justice Holmes, however, the determination whether a particular proceeding is judicial or nonjudicial "depends not upon the character of the body but upon the character of the proceedings." *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150 (1908); *see also Lathrop* v. *Donahue*, 367 U.S. 820, 824, 81 S.Ct. 1826, 1828, 6 L.Ed.2d 1191, *reh'g denied*, 368 U.S. 871, 82 S.Ct. 23, 7 L.Ed.2d 72 (1961). "The form of the proceeding is not significant. It is the nature and effect which is controlling." *In re Summers*, 325 U.S. 561, 567, 65 S.Ct. 1307, 1311, 89 L.Ed. 1795 (1915). In making "rules of general application" that act "not on parties litigant but on all who practice law" state supreme courts act in a nonjudicial manner, as "legislatures." *Supreme Court of Va.* v. *Consumers Union*, 446 U.S. 719, 731, 100 S.Ct. 1967, 1974, 64 L.Ed.2d 641 (1980) (quoting *Consumers Union* v. *American Bar Ass'n*, 470 F.Supp. 1055, 1064 (E.D.Va. 1979) (Warriner, J., dissenting)); *see also In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982).

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[1] The district court would still have jurisdiction, however, if the plaintiffs made an effective *England* reservation, *see England* v. *Louisiana Medical Examiners*, 35 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), a legal issue the court does not reach, given the jurisdictional ruling.

[2] This court finds the "remedy" to be a rule promulgated in a nonjudicial proceeding. It looks like a rule, reads like a rule, and acts like a rule. It has four sections: a definitional section, a section creating a Review Board, a section announcing the procedures the Review Board shall follow, a section providing for the use of the proceeds of notarial and bar stamps, and a section making the rule applicable to all lawyers and retaining power to modify the rule. *See* 86 J.T.S. 60, Official Translation at 17-24. The "remedy" does not "investigate[ ], declare[ ], and enforce[ ] liabilities as they stand on present or past facts and under laws supposed already to exist," but rather "looks to the future and changes existing conditions by making a new rule to be applied thereafter." *Prentis*, 211 U.S. at 226, 29 S.Ct. at 69; *see In re Summers*, 325 U.S. 561, 566-67, 65 S.Ct. 1307, 1310-11, 89 L.Ed. 1795 (1945).

[3] The "particular case" that the Supreme Court of Puerto Rico was asked to decide was whether Schneider and Ramos should be disbarred for failure to pay dues. In the process of adjudicating that case, the Puerto Rico court apparently became aware that the then existing application of the mandatory bar statute violated dissenting members' rights. Rather than permit Schneider and Ramos to practice law without being members of the Colegio, however, the court, apparently, decided to reform the Colegio to protect dissenters' rights, as the court interpreted those rights under the Puerto Rico Constitution. The court then combined its adjudication of Schneider's and Ramos' disbarment with its own bar reform, by holding that Schneider and Ramos must pay dues *and* that the Colegio must make sure none of their money is spent on ideological activities.[2] Thus, the 1982 *Schneider-Ramos* opinion may well be an example of what the Second Circuit identified

[2] That the bar reform portion of the *Schneider-Ramos* proceeding was rulemaking was admitted as such by defendants in their 1982 briefs to the First Circuit, *see* Statement of Issues and Designation of Contents of Appendix (dated October 11, 1983 and filed with the First Circuit); aside from it being obviously correct, that admission is now the law of the case.

as a tough case under *Feldman*; a combined adjudication and rulemaking in a single opinion. *See Zimmerman* v. *Grievance Com. of Fifth Jud. Dist.*, 726 F.2d 85, 86 (2d Cir.), *cert. denied*, 467 U.S. 1227, 104 S.Ct. 2681, 81 L.Ed.2d 876 (1984).

The subsequent disbarment and reinstatement of Schneider and Ramos, however, constituted the end of the "particular case" aspect of *Schneider-Ramos*, so that the 1986 opinion is pure rulemaking. The mention of Schneider and Ramos by name in part E of the 1986 remedy is gratuitous, as they are already covered by the generic term "all those who have stood under the Temporary remedy decreed by this court," which is not restricted, on its face, to lawyers party to the earlier adjudications. *See* 86 J.T.S. 60, Official Translation at 23. That the remedy followed the appointment of a special master and evidentiary hearings does not make the proceeding judicial. "Most legislation is preceded by hearings and investigations." *Prentis*, 211 U.S. at 227, 29 S.Ct. at 69-70. The decision of the Puerto Rico Supreme Court to continue with the outward form of a judicial decision in a particular case is that court's prerogative; but that form is not binding on the federal courts. *See Lathrop* v. *Donahue*, *supra*; *In re Summers*, *supra*; *Prentis*, *supra*.

Furthermore, even if the 1986 remedy were construed to present *Zimmerman*'s hard case, the judicial and non-judicial aspects of the opinion would be separable. The Colegio's action to force Schneider and Ramos to pay their dues is not "inextricably intertwined" in any legal or logical sense with the Puerto Rico court's bar reform (although it certainly is in a causal sense). *See Feldman*, 460 U.S. at 483 n.16, 103 S.Ct. at 1315 n.16. Justice Holmes' declaration that federal courts should not be bound by the *form* of state action can and should be extended this far, as I think the Second Circuit would have agreed had they been forced to decide the hard case they identified. *See Zimmerman*, 726 F.2d at 86.

In the unlikely event that this conclusion is wrong as to plaintiffs Schneider and Ramos, it should be mentioned that

the other plaintiffs stand on a different footing. Although Romany was subject to the original complaint filed by the Colegio in 1977, he paid his dues prior to the Puerto Rico court's consideration of the case. Thus, he had no particular case adjudicated in a judicial proceeding that he could have appealed to the U.S. Supreme Court. Furthermore, prior to the hearing that provided the evidentiary basis for the Puerto Rico court's rulemaking, the court explicitly removed him from further participation in the case. Should he somehow be construed as having participated in the 1982 proceeding, and should the 1986 remedy somehow be construed as resulting from a judicial proceeding, Romany would still be entitled to present his case here, because he would certainly have had no standing to appeal the 1986 remedy to the U.S. Supreme Court. Finally, the rest of the plaintiffs, who were never party to the Puerto Rico court proceeding, lie completely outside of any *Rooker* problems in this case and thus obviously have standing to sue in this court to allege violations of their federal constitutional rights.

II. *Res Judicata and Collateral Estoppel*

The Colegio contends that, even if this court has subject matter jurisdiction under the *Rooker-Feldman* doctrine, the decision of the Puerto Rico Supreme Court in *Schneider-Ramos* is res judicata to plaintiffs' claims here. This court considered this argument in its 1982 opinion, 546 F.Supp. at 1268-1274. The decision there, that the claims are not barred by the Puerto Rico court action, was not appealed, *see Romany*, 742 F.2d at 37 n.6, and is accordingly the law of the case. *See* 18 Wright & Miller § 4478 at 801 (if a "matter is omitted from one appeal . . . it may be held foreclosed on a later appeal to the same court as a matter of law of the case") and cases cited therein.[3] Nevertheless, it is worth reviewing

[3] It is worth noting that the grounds on which the First Circuit vacated this court's earlier decision — abstention — presuppose both subject matter

why plaintiffs' claims are not barred by res judicata or collateral estoppel.

The federal rule regarding the preclusive effect of state court decisions is found in 28 U.S.C. § 1738, which states that "judicial proceedings [of any court of any state] . . . shall have the same full faith and credit in every court . . . as they have by law of usage in the courts of such state. . . ." *See, e.g., Kremer* v. *Chemical Construction Co.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982). This means that the question of the preclusive effect of the *Schneider-Ramos "judicial proceeding" depends on Puerto Rico law. See Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984).

[4-6] Puerto Rico's res judicata rules are contained in Article 1204 of the Civil Code, 31 L.P.R.A. § 3343; which states

> In order that the *presumption* of res judicata may be valid in another suit, it is necessary that, between the case decided by the sentence, and that in which the same is invoked, there be the *most perfect identity* between the things, causes and persons of the litigants, and their capacity as such.

(Emphasis supplied). The "perfect identity" requirement is the core of Puerto Rican res judicata law. If the requirements of res judicata are met, a party may not raise in the second action any "questions which could have been properly litigated and adjudicated in the former action." *Capo Sanchez* v. *Secretary of the Treasury*, 92 P.R.R. 817, 819 (1965). If the perfect identity requirements are not met, however, a party may still invoke the related doctrine of collateral estoppel, which precludes the relitigation by the same parties of issues "actually litigated and determined by a valid and final judg-

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jurisdiction and the lack of res judicata effect of the 1982 *Schneider-Ramos* opinion on this case. *See* 18 Wright & Miller § 4478 at 789 (law of the case applies "when a court decides that an issue was resolved implicitly").

ment." *Pereira* v. *Hernandez*, 83 P.R.R. 156, 161 n.7 (1961); *see also A & P General Contractors* v. *Asoc. Cana*, 110 D.P.R. 753, 10 Official Translations 984 (1981). The difference between the claim preclusive effect of res judicata and the issue preclusive effect of collateral estoppel is significant in this case because the *Schneider-Ramos* decision did not consider plaintiffs' federal claims. *See Romany*, 742 F.2d at 35. Thus, if the *Schneider-Ramos* decision is res judicata to this case it will preclude the federal claims of the *Schneider-Ramos* parties, because the federal claims "could have been raised" in *Schneider-Ramos*.[4] *See Commonwealth* v. *Soc. Civil Agricola e Industrial*, 104 D.P.R. 720, 4 Official Translations 546, 554 (1975). On the other hand, if the *Schneider-Ramos* decision has only collateral estoppel effect in this case, it will not preclude raising the federal claims here.

What is most immediately clear from the perfect identity requirement is that only Schneider and Ramos have any risk of res judicata effect, because they were the only "persons" who were the subject of the disbarment proceeding. *See Romany*, 742 F.2d at 35. The rulemaking aspect of *Schneider-Ramos* applied to the entire Puerto Rico bar, which, of course, includes all the plaintiffs, but it was not a "judicial proceeding" and, thus, does not come within 28 U.S.C. § 1738's ambit. *See Feldman*, 460 U.S. at 485-86, 103 S.Ct. at 1316 (promulgation of bar rule not a judicial proceeding). For that same reason the rulemaking is not res judicata to Schneider and Ramos, either. *See Pagan Hernandez* v. *U.P.R.*, 107 D.P.R. 720, 7 Official Translations 795, 804 (1978) (res judicata given to administrative action "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact . . ."). Thus, the inquiry here is limited to the preclusive effect of the *Schneider-Ramos* disbarment adjudication on Schneider and Ramos.

[4] This conclusion would be different if the plaintiff's attempted *England* reservation were found to be effective, an issue which this court does not reach. *See England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

An examination of the remaining two aspects of the perfect identity requirement, "things" and "causes," leads the court to the conclusion that *Schneider-Ramos* precludes none of the claims raised in this case. Under Puerto Rico law "[t]he thing corresponds basically to the object or matter over which the action is exercised," *Lausell Marxuach* v. *Diaz de Yanez*, 103 D.P.R. 533, 3 Official Translations 742, 745 (1975),[5] while the "cause" refers to the "ground, reason or motive for the claim." *Mercado Riera* v. *Mercado Riera*, 100 P.R.R. 939, 950 (1972) (citing Manresa, Comentarios al Codigo Civil 237-38, 240 (5th ed. 1950)). The "thing" at issue in the disbarment proceeding was the money Schneider and Ramos had not paid the Colegio, along with their current membership in the Colegio, while the "cause" could best be described as their current obligation to pay that money and to belong to the Colegio.

The "thing" at issue in this case is the *future support*, financial and otherwise, that Schneider and Ramos will be obligated to provide the Colegio under the 1986 remedy, along with their future membership in the Colegio. This future support and membership is a different "thing" than the money and membership at issue in *Schneider-Ramos*. Similarly, the "cause" of this action is their *prospective obligation* to provide that support and belong to the Colegio, which obligation had not yet arisen when *Schneider-Ramos* was decided. Thus, Schneider and Ramos' current case lacks the "most perfect identity" with the disbarment case and, accordingly, is not precluded by that earlier case.

The civil law commentators Colin and Capitant speak directly to this point. *See* Colin and Capitant, III *Derecho Civil* 499-508 (translation of the 2d French Ed., 1960). They describe res judicata as a (nearly) irrebuttable presumption that the first court decided the case (as a whole) correctly (hence the claim preclusive effect). *Id.* at 499. This presumption ap-

[5] *See also Mercado-Riera* v. *Mercado-Riera*, 100 P.R.R. 939, 948 (1972) (citing Scaevola, 20 *Codigo Civil* 534 (2d ed. 1958)) ("thing" refers to "subject matter" of the action).

plies, however, only to the rights and obligations before the first court; the presumption does not apply to rights and obligations that arise *after* the period of time that is the subject of the adjudication. *Id.* at 503. A second court may adjudicate those subsequently arising obligations, subject to the rule of collateral estoppel. "There may well be an internal logical contradiction, but no *opposition* between the two decisions, supposing they reach different results." *Id.* at 503 (translation ours). There is no *opposition* because the second suit does not nullify any rights or obligations determined by the earlier suit. *See Mercado Riera*, 100 P.R. at 949-50 (one criteria for determining res judicata is whether "a different judgment in the second case would destroy or impair rights or interests established in the second"). Here, the *Schneider-Ramos* judicial proceeding determined the rights and obligations relating to Schneider's and Ramos' refusal to pay dues up to that time. Their prospective obligation to pay dues was not at issue. Of course, the legal issues involved in both retrospective and prospective determination are the same; thus the rule of collateral estoppel precludes Schneider and Ramos from raising before this court any issues actually litigated and decided in *Schneider-Ramos*.

The common law recognizes a similar relationship between successive suits concerned with obligations that arise in successive years. *See Lausell Marxuach*, 103 D.P.R. at 535, 3 Official Translations at 745 (courts may look at non-Civil Law sources for "comparative purposes" when dealing with res judicata). For example, the Supreme Court noted in *Commissioner* v. *Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948), that "[i]ncome taxes are levied on an annual basis" and went on to hold that "[e]ach year is the origin of a new liability and of a separate cause of action. . . . [A] judgment on the merits is *res judicata* [only] as to any subsequent proceeding involving the same claim and the same year." *See also United States* v. *Rexach*, 482 F.2d 10, 19 (1st Cir.), *cert. denied*, 414 U.S. 1039, 94 S.Ct. 540, 38 L.Ed.2d 330 (1973).

For similar reasons a suit regarding an abatable nuisance is res judicata only as to subsequent proceedings involving liabilities that had accrued as of the time of the first suit. *See Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 327-29, 75 S.Ct. 865, 868-69, 99 L.Ed. 1122 (1955); *see also International Harvester Co.* v. *OSHA*, 628 F.2d 982, 985-86 (7th Cir. 1980).

Schneider and Ramos may press their federal claims before this court.

III. *Case or Controversy*

[7] The Colegio also moves to dismiss on the grounds that the plaintiffs have not presented a case or controversy. That contention is best answered by reference to this court's earlier decision on the merits, which, right or wrong, clearly indicates that the plaintiffs are bringing a case that merits judicial attention. *See Schneider* v. *Colegio*, 565 F.Supp. 963 (D.P.R. 1983), *vacated on other grounds*, 742 F.2d 32 (1st Cir. 1984). Furthermore, this court's earlier ruling on the case or controversy issue, 546 F.Supp. at 1261, which was not appealed, is also the law of this case.

IV. *Conclusion*

The Colegio's motion to dismiss is DENIED.
IT IS SO ORDERED.

APPENDIX H

United States District Court
District of Puerto Rico

Civ. Nos. 82-1459 (TR), 82-1513, 82-1514 and 82-1532.

ROBERT E. SCHNEIDER, JR. ET AL.,
PLAINTIFFS,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO, ET AL.,
DEFENDANTS.

Oreste V. Ramos Diaz, pro se.
Jorge F. Romany, pro se.
Jorge Souss Shidrewa, pro se.
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MARCH 3, 1988

OPINION AND ORDER

TORRUELLA, *Circuit Judge*

I. *History of the case*

Plaintiffs in this case have presented the court with a challenge, under 42 U.S.C. § 1983, to the requirement that they belong to the integrated bar association, the Colegio de Abogados de Puerto Rico ("Colegio" or the "Bar"), as a condition to the practice of law in Puerto Rico. The Association is funded through compulsory annual dues and the proceeds from stamps that must be purchased and affixed by lawyers and notaries to papers filed with the courts and to notarized documents. The court must therefore evaluate the integrated bar scheme, including the escrow/rebate procedure built into it. It must decide whether compulsory membership in the Colegio violates dissenting members' non-associational rights under the First Amendment, in light of the importance traditionally assigned to those rights, and in view of the governmental interests that prompt the regulation of attorneys and the practice of law.

In order to simplify the reader's task, the history of this hoary case will be set forth. The Colegio instituted disbarment proceedings in 1977 against ninety-nine attorneys for failure to pay their annual dues. All but two—Robert E. Schneider and Hector R. Ramos Diaz—paid the dues. These two argued that Law Number 43, 4 L.P.R.A. § 771, *et seq.* (establishing the Colegio de Abogados) violates the Constitution of the Commonwealth of Puerto Rico. The Supreme Court of the Commonwealth received the report of a Special Master in September of 1980, entertained proofs and stipulations by the parties until March of 1981, and issued its opinion. *Colegio de Abogados* v. *Schneider*, 112 D.P.R. 540 (1982) (hereinafter the "1982 Opinion"). That court ordered Schneider and Ramos to pay all dues owing the Colegio, and upheld the constitutionality of the integrated bar under the Constitution of Puerto

Rico. It also announced that a procedure would be established, in cooperation with the Colegio, to ensure that dissenting members of the Bar would not be compelled to finance "ideological" activities through their bar dues.

In spite of the promised procedure, Schneider and Ramos refused to pay, and were consequently disbarred. They and three other plaintiffs (who had been paying dues and were not disbarred or subject to the 1982 Opinion) brought suit in federal court under 42 U.S.C. § 1983. That suit was limited to a claim for declaratory and injunctive relief from their *prospective* obligation to pay dues and belong to the Colegio. *Schneider* v. *Colegio de Abogados De Puerto Rico*, 546 F. Supp. 1251 (D.P.R. 1982).[1] This court thus expressly dismissed "[a]ll allegations or claims seeking in any way to modify, alter, challenge, or otherwise affect the outcome of the suspension for non-payment of *past* dues of plaintiffs Schneider and Ramos in [the 1982 Opinion], . . . for lack of jurisdiction." *Id.* at 1276 (emphasis supplied).

Next this court addressed itself to the substantive issues presented by this case. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963 (D.P.R. 1983), *vacated sub nom.*, *Romany* v. *Colegio de Abogados De Puerto Rico*, 742 F.2d 32 (1st Cir. 1984). On the record before it, the court found that "the Colegio engages in ideological and/or political activity of a pervasive and continuous nature. . . ." *Id.* at 965. It also noted that "there is no way of determining, from an accounting standpoint, the dollar amount of [support for ideological activities] except to conclude that from the pervasiveness, scope and breadth of this type of activity, it is obvious that the backing has been and is considerable." *Id.* at

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[1] That decision was affected by *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir,. 1982) where the Court of Appeals, on petition for writ of mandamus, dismissed plaintiffs' action against the Justices, except as nominal parties. *But cf. Forrester* v. *White*, __ U.S. __, 108 S.Ct. 538, 543-44, 98 L.Ed.2d 555 (1988), (no immunity from suit for damages by judges for administrative or rulemaking actions).

971 (citing the testimony of Juan Espiet, the Colegio's auditor). In other words, the Colegio's expenditures in support of ideological activities were inextricably intermingled with its other, non-controversial expenditures.

On the basis of these and other findings, this court held that, as applied, Law No. 43 establishing an integrated bar violated dissenting attorneys' rights under the First Amendment. It ordered, in consequence, that the defendants (except for the Justices of the Supreme Court) be enjoined from taking any action based on plaintiffs' refusal to pay either the compulsory bar fees or the legal and notarial stamps. *Id.* at 979.

When called upon to review this opinion, however, the First Circuit declined to comment on the merits of the adjudication. *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984). Instead, it found that this court should have abstained from deciding the issue until the Puerto Rico Supreme Court should issue the remedy it promised in its 1982 Opinion. *Id.* at 40. The First Circuit grounded its holding on several premises that deserve mention here. It pointed out first that the Supreme Court had interpreted the Commonwealth's Constitution to require some sort of remedy for dissenting lawyers, parallel to the remedy required by the United States Supreme Court for dissenting workers in closed shop labor cases. *Id.* at 40 (citing *Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

The First Circuit commented also that the Commonwealth Court has the power to determine the grounds for admission to the bar. It could, therefore, fashion a procedure parallel to that suggested in the above-cited cases, to safeguard dissenters' associational freedoms. Since the Supreme Court of Puerto Rico declared itself to be in the process of doing just that, the Court of Appeals reasoned, the federal courts should await the

result. "[W]hile even provision of a remedy in *complete* compliance with *Abood* and its progeny would not necessarily signal the end of plaintiffs' federal case, it would surely transform it." *Romany*, 742 F.2d at 41 (emphasis added). The First Circuit added:

> Conversely, of course, to the extent whatever remedy the Supreme Court of Puerto Rico approves falls short even of the standards established in *Abood* and *Ellis*, plaintiffs will have a different, more specific and more powerful federal constitutional claim.

Id. at 42.

The Court of Appeals, as an interim measure, decided that the plaintiffs should put 50 percent of their dues into an escrow account, to be distributed to the Colegio and the plaintiffs pursuant to a final resolution of this litigation. Citing *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435, 444, 104 S.Ct. 1883, 1890, 80 L.Ed.2d 428 (1984) the First Circuit made the following statement:

> [W]e do not decide now whether dues reduction alone is a satisfactory answer to plaintiffs' complaint; but at least it is clear that, at a minimum, dissenting attorneys may not be forced to subsidize ideological activity outside the ambit of activities for which membership may properly be compelled. This being so, plaintiffs should not be forced to pay full dues to the Colegio while this litigation proceeds.

Romany, at 44.

This court accordingly held this suit in abeyance until the Puerto Rico Supreme Court should complete its rule-making procedure. The new rules for dealing with dissenting attorneys' dues finally issued on June 26, 1986, in the form

of an opinion. *Schneider* v. *Colegio de Abogados*, 86 J.T.S. 10 (June 26, 1986) (hereinafter, the "1986 Rule").[2] The specific details of these rules will be explored further in considering their sufficiency under the First Amendment; for the moment it will suffice to sketch in their broad outlines. The Commonwealth court concluded that compulsory bar membership, the imposition of dues, and the required affixation of stamps (with proceeds to the bar) on legal documents were all constitutionally valid. It also decided that the Colegio should be free to engage in any activity authorized by Law No. 43, or by Court-ordered rules. It found, most importantly, that "the Bar Association may, constitutionally, pronounce itself on idelological matters, but that the members who dissent from such pronouncements are entitled, under the Constitution of Puerto Rico, to object to the use of their contributions or of part thereof for the ideological activities they do not approve." *Schneider*, 86 J.T.S. 60, Official Translation at 1-2.

In order to protect this right to object, the court set up an interest-bearing escrow account, into which 15% of dissenting attorneys' fees would be deposited. At the end of the year, dissenting attorneys could specify particular "objectionable" activities, and receive a refund of a proportion of their dues equal to the proposition of total dues expended on those activities. Attorneys were also given the option of objecting throughout the year, on a case-by-case basis, to particular

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[2] As this court held on August 21, 1987, while the "remedy" was issued in opinion form, with a case heading, it is nonetheless "a rule promulgated in a non-judicial proceeding. It looks like a rule, reads like a rule, and acts like a rule." *Schneider* v. *Colegio de Abogados de Puerto Rico*, 670 F. Supp. 1098, 1102 (D.P.R. 1987).

The Court attaches the "rule" label to the 1986 opinion not to engage in semantic game-playing, but in order to emphasize the opinion's true nature, and to avoid even the appearance of reviewing a judicial decision of the highest court of Puerto Rico. In the exercise of an over-abundance of care we state that it is only the validity of the 1986 Rule, as applied to the facts presented to this court, that we consider to be the case and controversy before this court.

activities. A three-member panel, composed of retired members of the judiciary, was established to determine what activities are truly "objectionable," and to decide if the 15% figure should be altered at some later date.

The Puerto Rico Court opted for the term "objectionable" rather than "ideological" in describing impermissible expenditures. *Schneider*, 86 J.T.S. 60, Official Translation at 17. That decision was made, apparently, because the court felt that the Bar not only can and should speak out on many ideological issues, *Schneider*, 112 D.P.R. 540, 551 (1982), but can compel objecting attorneys to fund some of those expressions, as long as they are "comprised within the Bar Association's purposes and ends which are germane thereto. . . ." 86 J.T.S. 60, Official Translation, at 17. The Bar Association's purposes—and, in consequence, the content of "objectionable activities"—are to be determined by reference to the powers granted the Bar by the Legislature or the Puerto Rico Supreme Court. *See*, *Id.*, Official Translation at 17-18.

The issuance of the 1986 opinion reactivated the case now being decided. *Schneider*, 742 F.2d 32, 44 (1st Cir. 1984) ("The district court may proceed after the Supreme Court of Puerto Rico has finally determined what remedy to provide. . . ."). This court entertained several motions, set a hearing date, and reopened the record to allow the parties to introduce additional evidence. The parties declined to present additional witnesses at the time of the hearing and limited their evidence to mostly irrelevant documents. The parties also chose—and this is of crucial significance for today's decision—to stipulate "that activities similar in nature to those undertaken by the Colegio prior to 1983 have continued".[3]

[3] The Supreme Court of Puerto Rico, in its 1986 rule/decision, found that the Colegio's ideological activities are de minimis. The Colegio now argues that these findings are somehow binding on the court. That argument, however, is patently inconsistent, in light of the court's extensive findings in 1983, with the Colegio's stipulation set forth above. Nevertheless, it is the stipulation that binds the parties to this case. The court notes, however, that

The defendant Bar Association then brought a motion to dismiss for lack of jurisdiciton which the court decided this past August 21. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 670 F. Supp. 1098 (D.P.R. 1987). That opinion explained that this case did not constitute a review of any issues adjudicated by the Supreme Court of Puerto Rico in the earlier disbarment proceedings (the 1982 Opinion). Rather this case constitutes a challenge under the *federal* constitution to an integrated bar scheme. A challenge that was affected, but not mooted, by the Supreme Court of Puerto Rico's decision to implement—out of concern for the requirements of the Constitution of the Commonwealth of Puerto Rico—an escrow/rebate program for objecting attorneys.

This court found that, first, defendants had failed to challenge on appeal this court's initial assertion of jurisdiction. In any event, it held,the Supreme Court was acting in its rule-making capacity in promulgating the 1986 Rule, and federal adjudication of the constitutionality of a rule is appropriate even if the rule is enunciated by the highest court of the Commonwealth. Furthermore, the case against Ramos and Schneider had ended already with their disbarment and subsequent reinstatement. *See Schneider*, 670 F. Supp. at 1102-03; *Schneider*, 546 F. Supp. 1251, 1274 (D.P.R. 1982). And, in fact, the 1986 Rule is not a remedy limited to the parties in a certain case, but applies to all dissenting attorneys whether or not they were parties to any of the cases discussed so far.

In that motion, the Colegio also claimed that either res judicata or collateral estoppel bar plaintiffs' claims in this court. Again, these issues were decided in this court's 1982 opinion, *see Schneider*, 546 F. Supp. at 1268-74, and not

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the perceived factual inconsistency between this court's findings and the Commonwealth's are due, at least in part, to a different conception of what are ideological activities.

More importantly, defendants failed, notwithstanding the Court's repeated invitations to that effect, to present evidence concerning Colegio's non-ideological activities. *See* Appendix A, which is a partial transcript of the proceedings.

appealed, *see Romany*, 742 F.2d at 37 n.6, and are therefore the law of the case. *Schneider* 670 F. Supp. 1103. These objections lack substance in any event, as this court pointed out, because the requisite pefect identity for res judicata does not exist. *Id.* at 1104-05; and beacuse the issues being decided here were not actually litigated or addressed by the Puerto Rico Supreme Court in its 1982 adjudication, in such a way as to trigger the issue-preclusive effect of collateral estoppel. *Id.*[4]

Before considering the relevant constitutional principles, it may be important to point out the reasons for the dissenters' discontent. This court found in 1983, and the parties' stipulation, *ante* at p. 677, now puts beyond dispute, that "the Colegio engages in ideological and/or political activism of a pervasive and continuous nature. . . ." *Schneider*, 565 F. Supp. 963, 965 (D.P.R. 1983). The court attempted to highlight the extent of the Colegio's involvement in issues of a highly partisan and divisive nature by giving examples of its activities, *see id.*, at 965-71. Because of the importance of these findings of fact, and their present relevance in view of the pretrial stipulation of the parties (the footnotes in the original findings are excluded only for convenience; they are nevertheless part of our findings).

II. *Findings of Fact*

(1) At least since 1973, the President of the Colegio has made annual appearances before the United Nations to present the "official" position of the Colegio with regard to the

[4] The court decided these issues in 1982. *See Schneider*, 546 F. Supp. 1251, 1266-74. In 1987 it reconsidered, and again decided these issues adversely to the defendants. *See Schneider*, 670 F. Supp. 1098 (D.P.R. 1987). It continues to find that reasoning persuasive, and deeply regrets that counsel for the Colegio continues to waste its time and the court's by devoting at least 27 of 50 pages in its latest Memorandum to the court, filed a short two months after this last opinion, to these twice-settled issues. Counsel would have done well to address himself more single-mindedly to the merits of this case—the only issues in contention today.

political status of the Commonwealth of Puerto Rico to the effect that the Commonwealth is a colony of the United States, and to request that the "case" for its decolonization be submitted for action to the United Nations General Assembly. This position is espoused as representing the views of *all* the members of the Colegio.

The appearances by the Colegio before the United Nations' Decolonization Committee, as well as the substance of the Colegio's position therein, have received wide-spread publicity in Puerto Rico and in the international news media.

(2) The Board of Governors has adopted many resolutions dealing with diverse topics of an ideological and/or political nature. These include among others: condemning the Federal Bureau of Investigation for "intervention" with the Puerto Rican independence movement and its leaders (Plaintiffs' Exhibit 44); opposing an increase in the number of Federal Judges in Puerto Rico as an "attempt to fortify Federal Control over the island contrary to the duty of Congress to recognize the right of Puerto Rico to assume full sovereignty" (Plaintiffs' Exhibit 46); requiring that the President of the United States order the Navy to cease target practice in the island of Vieques and withdraw therefrom, "and that this resolution be sent to the Puerto Rican Legislature, to Congress, to the President, to the Decolonization Committee of the United Nations and to the media for massive promulgation" (Plaintiffs' Exhibit 49); resolving to "orient and inform" the people of Puerto Rico regarding the resolution of the Decolonization Committee of the United Nations regarding Puerto Rico (Plaintiffs' Exhibit 235 at p. 14. Resolution No. 6); condemning the Legislature of Puerto Rico for its "distortion [of] the historical truth" in condemning the previously referred to resolutions of the Decolonization Committee (Plaintiffs' Exhibit 235 at p. 29, resolution No. 14); requesting the President of the United States that he release four Puerto Rican Nationalists convicted of participating in the shootings in Congress in 1952 (Plaintiffs'

Exhibit 61); opposing a new voter identification system proposed by the Puerto Rico Electoral Committee (Plaintiffs' Exhibit 62); repudiating the Somoza regime in Nicaragua, supporting the Sandinista Front of National Liberation, and asking the United States to recognize the "provisional Government of National Reconstruction" (Plaintiffs' Exhibit 235 at p. 66, Resolution No. 32); condemning the Russian invasion of Afghanistan (Plaintiffs' Exhibit 235 at p. 91, Resolution No. 43); expressing support for Olympic sports and that the Puerto Rico Olympic Committee be the one to decide whether or not to boycott the Moscow Olympic Games (Plaintiffs' Exhibit 235 at p. 92, Resolution No. 44); stating the Colegio's concern "in the name of all qualified voters" as to the state of the electoral process and authorizing the president of the Colegio to name a committee "to watch and guarantee the purity of the electoral process" (Plaintiffs' Exhibit 235 at p. 102, Resolution No. 51); expressing the Colegio's solidarity with the people of El Salvador and condemning the governing Military Junta (Plaintiffs' Exhibit 235 p. 114, Resolution No. 2); endorsing and supporting a march to be held favoring the movement to get the Navy to leave Vieques (Plaintiffs' Exhibit 236 at 129, Resolution No. 10); asserting the "defense" of Puerto Rico culture and rejecting "the efforts of the Commonwealth with relation to the Institute of Puerto Rican Culture as attempts to destroy the cultural heritage of Puerto Rico (Plaintiffs Exhibit No. 235 at p. 135, Resolution No. 13); criticizing the United States for transferring Haitian refugees to Puerto Rico and demanding their immediate release to the mainland (Plaintiffs' Exhibit 235 at p. 149, Resolution No. 21); condemning the United States "for imposing a concentration camp on Puerto Rico in complicity with the Government of Haiti" (Plaintiffs' Exhibit 235 at p. 167, Resolutiom No. 30); oppósing the use of the Federal Grand Jury system in Puerto Rico (Plaintiffs' Exhibit 235, at p. 137, 151, 162, Resolutions Nos. 14, 22, 28); blaming

the police and the University Administration for the use of force in a strike by students at the University of Puerto Rico (Plaintiffs' Exhibit 235 at p. 201, Resolution No. 42); condemning the draft as a "blood tax paid by Puerto Ricans in the four wars fought in the Armed Forces of the United States" (Plaintiffs' Exhibit 235 at p. 203, Resolution No. 43).

All of the above have been widely disseminated by the Colegio throughout the news media, as a matter of practice and routine.

(3) The physical facilities of the Colegio have been routinely used for ideological and/or political activities unrelated to the purposes of the Colegio. These activities have included among others: a concert to raise funds for the accused in the armed robbery of a Wells Fargo truck; a press conference by the "Committee for the Defense of Our Dignity", a press conference by the "Committee for the Defense of Democracy in Haiti"; numerous press conferences by labor unions; assembly of the "National Committee for the Defense of Vieques"; meetings of the "Committee for the Selection of Celeste as Mayor"; a press conference of the "Pastors' Association"; a seminar about the "organizational and political aspects of the Grand Jury"; press conferences of the Puerto Rican Socialist party; press conference of the "United Committee Against Repression"; public hearing of the Central Committee of the Popular Democratic Party; meetings to organize a defense committee by the Puerto Rican Socialist League; a meeting of the leadership of the Popular Democratic Party in San Juan; a meeting of the San Juan Zone of the Puerto Rican Socialist Party; an organizational meeting of "Citizens interested in the improvement of TV"; meetings of the "Crusade for the Rescue of Vieques"; a press conference of the "Artists in Favor of Artistic Freedom"; commemoration of the anniversary of the death of Dr. Pedro J. Chamorro; a press conference of the "Committee for the Defense of Puerto Rican Culture"; a press conference and meetings of the "Committee for the Defense of

Nicaragua"; meetings of the "Law Students' Council" in connection with the strike at the University of Puerto Rico; a concert by the "Committee for the Defense in Support of the Puerto Rican Prisoners of War"; a press conference of the "Committee for the Rescue of Villa sin Miedo," as well as various meetings and conferences related thereto; a movie-showing by "Claridad," the official newspaper of the Puerto Rican Socialist Party, dealing with education in Cuba; a press conference by the Federation of University Students for Independence in connection with the "situation" at the University of Puerto Rico; an activity of the Puerto Rican Socialist Party in support of Cuba; a "cultural-political" activity by the "Committee for the Defense of Nicaragua"; a press conference by the local of the Professional Air Traffic Controllers Organization regarding their negotiations and strike; a showing of the movie "El Salvador; the people shall triumph," by the "Puerto Rican Committee in Solidarity with the Salvadoran People," as well as numerous other activities by said organization; a conference by the Dominican Revolutionary Party; meetings and press conferences of the "Committee Against the Uniform Increase in Tuition" of the University of Puerto Rico; a press conference of the Vieques Fishermen's Association regarding military maneuvers in the Caribbean Area; a press conference by the "Puerto Rican Ecumenical Social Action Committee" about the role of the "Church in the 80's"; an organizing meeting of the New Progressive Party followers of "Hernan Padilla for Governor"; the annual assembly of the "Puerto Rican Confederation of Spiritualists"; a press conference of the "National Ecumenical Movement" in support of the people of El Salvador.

Many of these activities were held without any charge being made by the Colegio to the sponsoring group, or with only a nominal fee being charged. Irrespective of whether or not a charge is made for the use of the Colegio's facilities, because of the continuous nature of these activities and the widespread

publicity given to the fact that they take place in the Colegio's premises, a general impression is given that the Colegio is somehow associated in an active manner with at least some of these activities. This general impression is buttressed by the nature of the resolutions approved by the Board to which we have previously alluded, many of which in fact appear to complement the above-mentioned activities. The Colegio's total failure to disavow its sponsorship of the activities held within its premises does nothing to dissipate this impression.

(4) The Colegio also sponsors various publications. These include a law review, a monthly news letter and the miscellaneous reports of its various committees. Several resolutions and proceedings of the Board of Governor's and of the general assembly, of an ideological or political nature, have been published in the Colegio's law review, a publication which receives wide dissemination in and outside Puerto Rico. Additionally, the law review publishes some articles which can only be cataloged as political or ideological rhetoric, with little, if any, relationship to the workings of a law journal. The monthly news letter is also used to disseminate the resolutions of the Board of Governors, some of which as previously indicated, have a strong ideological or political content. The program for the annual general assembly is also a source of publicity for ideologically-tainted resolutions, and is used as well for other proselytizing purposes.

Related to the above are the various committees and commissions of the Colegio. These groups issue reports on matters, including ideological and political issues, many of which have been the basis of the resolutions previously referred to herein. Many of these reports have been independently published by the Colegio, and their contents have received wide publicity and circulation throughout the Colegio membership and the general public.

(5) The Colegio has appeared either through testimony or by written briefs, before Congressional committees and before

committees of the Legislature of Puerto Rico to present institutional views on behalf of the Colegio membership regarding pending legislation and other matters of a political and/or ideological nature. Examples of these activities include appearances before Congressional Committees considering legislation dealing with migrant farm workers, and similar appearances to oppose legislation to increase the number of District Judges in the United States District Court for Puerto Rico. Colegio President Tapia Flores also appeared in person before a committee of Congress considering the enactment of Spanish language legislation for the U.S. District Court in Puerto Rico. On a second occasion he appeared before a committee investigating Naval activites in Vieques. Colegio President Negron Garcia appeared before the Puerto Rico Legislature to condemn the Electoral Law of Puerto Rico, and to state the Colegio's position as to "what the electoral process in a democracy should be."

Schenider, 565 F. Supp. 963, 966-71.

(6) Although no evidence was presented by the Colegio regarding its non-ideological activities, we assume that these activities take place. There is, however, no way of deciding from the evidence before us the proportion of non-ideological to ideological activities. Considering the testimony of the Colegio's auditor, Juan Espiet, to the effect that there is no way of determining, from an accounting standpoint, the extent of nonideological versus ideological activities, and further considering the pervasiveness of the latter, we are forced to conclude that the ideological activities of the Colegio constitute a large and inseparable proportion of the Colegio's total activities.

III. *The relevant constitutional principles*

A. The First Amendment Principles

The court turns therefore to its principal task: deciding precisely "the ambit of activities for which membership [in

the Bar] may properly be compelled," *Romany*, 742 F.2d at 44; and attempting to ensure that dissenting members are not forced to support ideological activity outside that ambit, if the rule set forth in the Commonwealth Court's 1986 opinion does not already do so. The court wishes to emphasize that it cannot and does not express any opinion regarding the validity of the integrated bar, including the escrow/rebate scheme, under the Constitution of the Commonwealth of Puerto Rico. *See Cuesnongle* v. *Ramos*, 835 F.2d 1486, 1492 n.6 (1st Cir. 1987).

If there is any settled proposition in this area of the law, it is that a corollary of the First Amendment freedom of association is the right *not* to associate. *See, e.g., Abood* v. *Detroit Board of Education*, 431 U.S. 209, 234-36, 97 S.Ct. 1782, 1799-1800, 52 L.Ed.2d 261 (1977); *Chicago Teachers' Union* v. *Hudson*, 475 U.S. 292, 301, 106 S.Ct. 1066, 1073, 89 L.Ed.2d 232 (1986). Compelling an individual to contribute to a particular association, through dues and membership therein, necessarily has an impact on that right. *See Hudson*, *supra*, at 301, 106 S.Ct. at 1073.

Whenever the interests protected by the First Amendment are infringed, the courts must strictly scrutinize that government action to determine if it advances a compelling state interest. *See Elrod* v. *Burns*, 427 U.S. 347-362, 96 S.Ct. 2673-2684, 49 L.Ed.2d 547 (1976) (opinion of Brennan, J.) ("The interest advanced must be paramount, of vital importance. . . ."); *Buckley* v. *Valeo*, 424 U.S. 1, 44-45, 96 S.Ct. 612, 647, 46 L.Ed.2d 659 (1976) ("whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression"). Furthermore, the governmental compulsion must be "carefully tailored to minimize the infringement." *Hudson*, 475 U.S. at 303, 106 S.Ct. at 1074. In the words of the Supreme Court:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be

> justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Roberts v. *United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984).[5]

The Supreme Court has dealt with the problem of compelled association in the union context. *See Chicago Teachers' Union* v. *Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986); *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Brotherhood of Railway Clerks* v. *Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Railway Employees Dept.* v. *Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956). The principles expressed in these cases are controlling here, although the differences between bar associations and unions preclude a purely mechanical application. Even extrapolating directly from *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961), an early case dealing with the constitutionality of the integrated bar, is unlikely to prove very fruitful. *See Gibson* v. *The Florida Bar*, 798 F.2d 1564, 1566-67 (11th Cir. 1986); *see also Abood*, 431 U.S. at 233 n.29, 97 S.Ct. at 232 n.29. Analysis of plaintiffs' claims therefore will require determining whether compulsory membership in the bar, with the present escrow/rebate system in place, is the least restrictive way to achieve Puerto Rico's compelling interests.

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[5] Whatever confusion may have existed concerning the standard to be applied when an individual is compelled to pay dues to an association, *see* Sorenson, *The Integrated Bar and the Freedom of Nonassociation—Continuing Siege*, 63 Neb.L.Rev. 30, 62 (1983), was allayed by *Hudson's* direct reference to traditional First Amendment analysis. *See Hudson*, 475 U.S. at 303 n.11, 106 S.Ct. at 1074 n.11; *see also Gibson* v. *The Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986).

B. Application of the First Amendment to the Colegio

1. The Asserted State Interests

[1] When announcing its new rule for dealing with dissenting attorney's fees, the Commonwealth court articulated several of the interests the integrated bar association is intended to further. Two were remarkably broad: "[t]he creation of a strongly pluralistic society . . .," 1986 Rule, Official Translation at 13 (quoting *Colegio de Abogados de Puerto Rico* v. *Schneider*, 112 D.P.R. 540, 549 (1982)) and "contributing to the betterment of the administration of justice." *Id.* at 18.

One can hardly conceive of loftier goals in a democratic society than creating a strongly pluralistic society and improving the administration of justice. And yet broad statements such as these cannot form the basis for an infringement of First Amendment rights. If used at all they must be narrowly tailored. The Eleventh Circuit, for example, has somewhat artificially narrowed this "amorphous" interest:

> The Bar should construe "improving the administration of justice" as pertaining to the role of the lawyer in the judicial system and in society. The collective expertise of lawyers is grounded in their long-standing relationship with the courts. Lobbying activities that infringe upon individual rights should relate directly to that expertise.

Gibson v. *The Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986). In a footnote it then gave examples of permissible lobbying subjects:

> Acceptable areas for Bar lobbying would include the following topics: (1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation pro-

> cedures; (4) regulation of attorneys' client trust accounts; and (5) law school and Bar admission standards.

Id. at 1569 n.4. In commenting on a similar statement of purpose advanced by the New Mexico Bar, the district court stated:

> The satandard urged by the Bar is an all-encompassing exception to the rule of *Abood*. It is difficult to conceive of an issue presented to the New Mexico Legislature which cannot arguably be related to the administration of justice or improvement of the legal system. The standard is too broad.

Arrow v. *Dow*, 544 F. Supp. 458, 462 (D.N.M. 1982). If "the administration of Justice" is deemed too broad a standard, what can be said of the "advancement of a pluralistic society"? Accepting these standards as the guides to determine permissible bar activity would be tantamount to a complete abdication of the court's duty to protect dissenting attorneys' First Amendment rights.

Besides their inherent ambiguity, these government interests read too broadly suffer from an additional fundamental flaw: Compelling association to further these interests acts directly to compel the expression of sensitive beliefs. As several Justice of the Supreme Court of Michigan recognized,

> [e]ven if the specific legislative political goals can be justified as advancing the public interest or improving the administration of justice, compelled support and association to further these activities is not constitutionally acceptable. The "public interests" and the "advancement of jurisprudence" are not unitary concepts subject to a single interpretation. Disagreements regarding legislative or other policy choices arise not only because they result in

> differing practical effects on individuals, but more importantly because they reflect differing ideological approaches to the subject matter. Such ideological beliefs, and association to promote or oppose such beliefs lie at "the core of those activities protected by the First Amendment." *Elrod* v. *Burns*, 427 U.S. 347, 356, 96 S.Ct. 2673, 2681, 49 L.Ed.2d 547 (1976) (plurality opinion).

Falk v. *State Bar of Michigan*, 411 Mich. 63, 305 N.W.2d 201, 218 (1981) (Ryan, J., joined by Moody and Fitzgerald, J.J.), *dismissed after further fact finding*, 418 Mich. 270, 342 N.W.2d 504 (1983) (*per curiam*).

In other words, lawyers would be compelled to express their opinion (or, worse, represent someone else's opinion as their own) on matters in which differing opinions are the product of *ideology*.[6] *Abood* v. *Detroit Board of Education* seems to state that such compulsion cannot be required as a condition for employment. *See Abood*, 431 U.S. 209 at 235, 97 S.Ct. 1782 at 1799. *Roberts* v. *United States Jaycees* reinforces this conclusion when it states that an infringement of First Amendment rights can only be justified by a compelling state interest "unrelated to the suppression of ideas." *Roberts*, 468 U.S. at 623, 104 S.Ct. at 3252.[7]

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[6] The very fact that differences of opinion stem from varying ideologies renders much less compelling the state's interest in getting an *attorney's* opinion, since it is less likely to be informed by his or her particular expertise as a lawyer than by his or her political ideological tendencies.

[7] One commentator has summed up all these objections as follows:

> [Advancing the administration of justice is too broad.] Too broad, I presume, in two senses. First, given *Abood's* applicability, any such standard must enable the bar and ultimately the courts to discriminate between valid and invalid uses of compulsory dues in order to safeguard the First Amendment rights of captive dues payers. But this standard is far too vague to serve as a basis for any such discrimination. Second, the standard's breadth suggests that there is a compelling state interest in having the bar lobby on virtually any bill it chooses, which seems preposterous. Lawyers' expertise is surely more modest than that and . . . bar position taking on some subjects germane to the administration of justice (e.g., no-fault auto insurance) may be so colored by lawyers' private interests as to have no distinctive, let alone compelling, public value.

Sorenson, *supra* n.4, at 61 (footnotes omitted).

For all of the above reasons, therefore, the court must search for narrower expressions of the state interest, when attempting to justify the burden that compulsory association places on dissenting attorneys' freedom of association.[8] It is worth noting that the Supreme Court, faced with the agency shop, reacted in a similar manner. The inquiry was not whether the payment of dues was narrowly tailored to advance "labor peace"; but rather whether it narrowly remedied the free rider problem—the threat to labor peace. As a consequence, the Supreme Court decided objectors should only pay for those activities that directly benefited them and contributed to collective bargaining and contract administration (which are the Union's core contributions to labor peace). *See Ellis*, 466 U.S. 435, 447-48, 104 S.Ct. 1883, 1891-92.

2. The Permissible Purposes

[2] Certain state purposes for the bar are clearly acceptable,[9] and attorney discipline is one of these. The Commonwealth clearly has an interest in ensuring that attorneys, as repositories of the public trust, and as officers of the court

[8] An additional reason for discarding these purposes may be pointed out: In light of the scope of the goal to be achieved (*e.g.*, a more pluralistic society) one may wonder if a compulsory bar association could ever be considered the means *least restrictive* of first amendment rights of reaching that ideal. Indeed, one may question whether compelling uniformity of expression is calculated to achieve a more pluralistic society at all.

[9] The conclusions the court sets forth in the following pages have been culled from the few cases on point, *see, e.g.*, *Gibson* v. *The Florida Bar*, 798 F.2d 1564, 1569-70 (11th Cir. 1986); *Arrow* v. *Dow*, 544 F. Supp. 458, 461-63 (D.N.M. 1982), and from the commentators, *see, e.g.*, Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 A.B.F.Res.J. 1, *passim*; *Sorenson, The Integrated Bar and the Freedom of Nonassociation—Continuing Siege*, 63 Neb.L.Rev. 30, 63-80 (1983); *Note*, Falk v. State Bar of Michigan: *First Amemdment Challenge to Bar Expenditures*, 3 Det.Col.L.Rev. 737, 747-50 (1982), as well as from the articulations of state interest set out by the Supreme Court of Puerto Rico, *see Colegio de Abogados*, 86 J.T.S. 60 (1986).

playing a crucial role in determining the guilt or innoncence of its citizens, are held to the highest level of integrity. The interest takes on even greater weight when one considers that only lawyers can be notaries in Puerto Rico, and that as notaries they validate all sorts of public documents, acting essentially as public officers. *See Schneider*, 565 F. Supp. at 972 n.34.

Furthermore, bar-controlled discipline is clearly a narrowly tailored method of policing attorneys. Lawyers themselves, better than anyone, know the pressures created by the practice of law. They can anticipate problem areas and effectively provide safeguards. Attorneys are uniquely qualified to strike the delicate balance between zealous advocacy and respect for the judicial system. Finally, they are in a particularly favored position to police themselves. While some aspects of this self-regulatory function may be seen to have ideological overtones (note, for example, the debate concerning attorney advertising), the weight of the interest and the bar's particular ability to advance it outweigh the burden on dissenting attorneys.[10]

A similar compelling state interest is upholding the competence of the members of the profession. The importance of skilled, well-trained lawyers to ensure the evenhanded application of the laws is self-evident. The government may require the bar to assure that, through continuing legal education, bar admission standards, and the supervision of law schools, attorneys become and remain qualified to practice the law. Again, attorneys are singularly qualified and owe a certain duty to ascertain lawyers' most serious educational needs and the best ways to meet them.

A third constitutionally permissible end is increasing the availability of legal services to society. This includes traditional

[10] One commentator, however, has suggested that if approximately 20 of 50 states manage equally well to perform all these functions by means of legislative regulation and judicial rule-making, without a compulsory bar association, then it cannot be said that an integrated bar is the least restrictive method of achieving *any* goals. *See* Sorenson, *supra*, at 69.

efforts like legal aid programs, public information regarding availability of legal services, and public education on substantive areas of law (*e.g.*, landlord-tenant law) that would increase citizens' ability to recognize and enforce their legal rights.[11] The reasons this can be seen as a compelling interest narrowly served by an integrated bar are similar to those described above: Lawyers' collective expertise places them in a special position to perform this function. Furthermore, their position in society, as a link between the written law and its living expression, imposes certain special duties on them to make legal services available to those for whom legislation would otherwise remain behind an impenetrable veil. Decisions regarding the course society ought to take lie in the political realm; once those decisions are incorporated into legislation, lawyers may be required to ensure that the law is explained to society's members.

Finally, the special and intimate relationship between attorneys and the courts gives attorneys special knowledge in areas relating to the improvement of the functioning of the courts. *See Gibson* v. *The Florida Bar*, 798 F.2d at 1569. They include such subjects as evidentiary rules, rules of procedure, docketing matters, and similar methods of ensuring judicial efficacy and efficiency. Public commentary by the Bar Association on these subjects is not likely to seriously implicate attorneys' political beliefs. Furthermore, they are subjects that, because of their arcane nature, escape public scrutiny to a great degree, making commentary by the qualified segment of the public all the more vital.

There are some expenditures that are not challenged, and do not seem to present any First Amendment problems. We note, for example, that the Bar Association provides attorneys with life insurance. A fifth category, therefore, of permissible

[11] This should not be read, of course, as a license to lobby for new consumer legislation, for example, but simply as the ability to inform people of the state of the law.

expenditures, are those with no expressive content, that convey no messages, and benefit all members equally. While not necessarily promoting a great public interest, these items do not act to infringe any real right to freedom of expression, and therefore need not be strictly scrutinized. *See Ellis* v. *Railway Clerks*, 466 U.S. 435, 456, 104 S.Ct. 1883, 1896, 80 L.Ed.2d 428 (1984).

The Bar's publications, of course, may meet all or none of these purposes. In this case, the court has found that the Bar's various publications contain markedly ideological material. *See ante*, and *Schneider*, 565 F. Supp. 963, 969-70. As the Supreme Court has made clear, "[i]f the [Bar] cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing about that activity." *Ellis* v. *Railway Clerks*, 466 U.S. at 451, 104 S.Ct. at 1894. In view of the extent of political content in these magazines, and its intermingling with permissible content, the publications as they exist now cannot be funded by objecting attorneys. Furthermore, trying to separately account for the expense of each individual published item is the kind of burdensome nit-picking that itself chills the exercise of First Amendment rights. Each publication stands or falls, therefore, as an indivisible entity, depending on its editorial policy. If a magazine, for example, is a free forum for the exposition of educational articles reflecting different viewpoints, it passes muster.

It is entirely possible that additional legitimate areas of concern for the Bar may exist or may develop. It is unfortunate that because plaintiffs' position is that no expenditures are permissible, and defendants' that all statutory purposes are permissible, the court has received no meaningful discussion of what means narrowly advance compelling state interests. This situation, as mentioned already, was aggravated by Colegio's insistence on procedural matters already repeatedly decided by this same court and its failure to supplement the record with any additional evidence from that previously presented.

IV. *The Constitutionality of the 1986 Rule*[12]

[3, 4] As the court has pointed out, *see Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963 (D.P.R. 1983), and the parties have stipulated, the Colegio uses a substantial portion of its budget to subsidize ideological activities. These are activities, as we have seen, for which support cannot be compelled. What we must now ascertain, therefore, is whether appropriate steps have been taken to ensure that dissenting attorneys' funds are not being used to finance those activities. The procedure that purports to do this is the 1986 Rule. *Schneider* v. *Colegio de Abogados*, 86 J.T.S. 10 (June 26, 1986). Whatever its value under the Constitution of Puerto Rico, however, it is clear that this remedy does not adequately safeguard dissenters' federal First Amendment rights.

As will be recalled, the rule defines "objectionable activities." It requires that 15% of annual dues be paid in to an escrow account for all those attorneys who enter general objections. It also provides that attorneys may object to specific activities, in which case it appears that the portion of their fees allocable to those activities will go into escrow. (While this last feature shows respect for members' feelings, it is clearly not compelled by the First Amendment, as the union shop cases make clear). At the end of the year, attorneys whose monies are in the escrow account can come forth and present, before a Review Board, their objections. Once the Review

[12] Although federal courts will often abstain when faced with a challenge to a new rule that lacks definitive interpretation by a state's supreme court, *Railroad Comm'n.* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 there is no need to do so here. The 1986 Rule is facially invalid. No interpretation by a court could limit the plain language of the rule regarding the ambit of permissible activities: the rule simply allows the court or the legislature to add permissible activities at will. That very uncertainty is fatal to its validity. Furthermore, the procedures it sets forth by no means adequately protect the dissenters. Finally, the harm is ongoing, and will continue, under the terms of the 1986 Rule. *Pullman* type abstention, therefore, is not required.

Board determines, under procedures yet to be set forth, which activities are objectionable and the costs allocable to them, a portion of the 15% would be returned to all objecting attorneys. This portion represents the proportion of their annual dues equal to the percentage of annual dues received by the Bar Association and spent on those objectionable activities.

Perhaps the most basic flaw in this arrangement lies buried in the rule's definition of "objectionable activities." The Commonwealth Court said: "Activities comprised within the Bar Association's purposes and ends which are germane thereto shall not be considered objectionable activities." 86 J.T.S. 10, Official Translation, at 17. A little later, the Court said:

> "The functions and purposes of the Bar Association are:
>
> . . . . . .
>
> To exercise other powers conferred by law or by the Supreme Court of Puerto Rico and any other incidental powers necessary or convenient for the ends of its creation and which are not in disagreement with the purpose and the law which creates the Bar Association."

Id. at 18.

It is obvious that the mere fact that an act lies within the statutory powers of a quasi-official organization does not permit the state to compel dissenters to fund that act. In fact, that was the very issue the United States Supreme Court avoided in *International Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1748, 6 L.Ed.2d 1141 (1961), by interpreting a statute not to permit certain challenged activities.[13] More importantly the Court explicitly held certain *statutory* purposes unconstitutional in *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). There the Michigan Supreme Court interpreted the relevant *statute* to permit

[13] An interpretation "not without its difficulties," *see Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 232, 97 S.Ct. 1782, 1798, 52 L.Ed.2d 261 (1977).

unions to lobby the legislature on certain subjects. The Supreme Court of the United States nevertheless said that "[First Amendment principles] prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job. . . ." *Abood*, 431 U.S. at 235, 97 S.Ct. at 1799.

To hold otherwise would be to permit the Commonwealth to determine, legislatively or by Court rule, the content of dissenters' First Amendment rights. The range of permissible compelled expression, as we have seen, must be determined by means of careful balancing of interests and rigorous constitutional analysis, not merely by deferring to legislative judgments. Therefore, since the remedy does not properly identify the activities which cannot be funded through compulsory fees, it fails to bring the integrated bar into conformity with the First Amendment.

The infirmities of the 1986 Rule do not end here, however. The procedure it sets out falls short of some of the requirements elucidated aleady by the Supreme Court in the union shop cases. The percentage of dues assigned to the escrow account has been set at 15% by the Commonwealth, with power in the Review Board to change that figure "within what is reasonable . . . according to the experience acquired." *Schneider*, 86 J.T.S. 60, Official Translation at 21. No justification is given for the 15% figure nor are any procedures set forth to allow objection to it or review of a decision to change that figure.

The Supreme Court made the requirements in this respect crystal clear:

> [T]he "advance reduction of dues" was inadequate because it provided [objectors] with inadequate information about the bases for the proportionate share. . . . Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential

> objectors be given sufficient informati n to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring then to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*.

Chicago Teachers Union v. *Hudson*, 475 U.S. 292, 306, 106 S.Ct. 1066, 1075, 89 L.Ed.2d 232 (1986) (footnote omitted).

In any given year, therefore, the percentage to go into escrow must be based on the Colegio's projected budget, and on its estimate of expenditures to be made for objectionable purposes. Furthermore, the United States Supreme Court requires that the organization justify the dues to be collected, not merely explain how the non-collected or escrowed fees will be spent. "An acknowledgement that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%". *Id.* at 307, 106 S.Ct. at 1076. In essence, the Colegio needs to make known to the members of the Bar—all of them—its proposed budget, allocating all the dues it intends to retain to one or other of the permissible ends set forth *ante*.

An additional reason to require *the organization* to explain in advance what its expenditures will be, and which are permissible, can be found in *Abood*, 431 U.S. at 241, 97 S.Ct. at 1802: "[To do otherwise] would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative." The solution, of course, is simply to categorize each expenditure in the budget under one of those heads, and use the percentage of expenditures not so allocated as the escrow percentage.[14] If it is

[14] It is noteworthy that *Hudson* does not require "absolute precision" in this respect. *See Hudson*, 475 U.S. at 307 n.18, 106 S.Ct. at 1076 n.18. The Court recalls also that Colegio's auditor once testified that it was impossible

impossible to do so in advance of the Colegio's fiscal year, the percentage can be determined by reference to average past budget items, with a view to reasonably expected changes in spending habits.

In this way, then, the Colegio will bear the initial burden of justifying all its expenditures, as required by *Hudson*, 475 U.S. at 307, 106 S.Ct. at 1076. In addition, dissenters must have a right to object to that allocation. The burden then remains on the Colegio to show before an "impartial decisonmaker" (who must render a "reasonably prompt decision") that the expenditure is germane to one of the permissible purposes. *Id.* at 307, 106 S.Ct. at 1076. That impartial body, of course, could be the one already in place by virtue of the 1986 Rule: The Review Board. The objectors' participation in this procedure, the provision of an impartial forum, and the allocation of the burden of proof to the Colegio are all necessary components of the escrow/rebate scheme.

One last item to be noted in this respect is the need for a "buffer." This is a certain percentage of the funds in addition to the unallocated percentage discussed above that should be escrowed in order to ensure that, if the impermissible expenditures exceed the amounts budgeted for them, the amount to be returned does not exceed the escrowed amount. (Compare *Hudson*, at 295, 106 S.Ct. at 1070). While the Supreme Court has not explicitly required such a buffer, this Court deems it necessary to keep the First Amendment infringement to a minimum. It need not be excessive, however, since the Colegio

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to isolate ideological from other expenditures. *Schneider*, 565 F. Supp. 963, 971 (D.P.R. 1983). Apparently, however, the situation has changed:

> The Bar Association carries a strict bookkeeping of its income and expenses. It has a competent and responsible internal and external auditing system. It has devised a system by virtue of which it is possible to determine the direct and indirect cost of any activity in such a way that anybody can accurately say what contribution would correspond per bar member to a specific activity.

Schneider, 86 J.T.S. 60, Official Translation at 12. Therefore, it seems not unreasonable, indeed required in order to narrowly tailor this scheme, to demand as much precision as is practically possible, so as to protect dissenters' First Amendment rights more adequately.

has a right also to use non-dissenters' fees in any way it chooses. *See Railway Clerks* v. *Allen*, 373 U.S. 113, 122, 83 S.Ct. 1158, 1163, 10 L.Ed.2d 235 (1963); *Colegio de Abogados*, 86 J.T.S. 60, Official Translation at 1 (citing *Colegio de Abogados*, 112 D.P.R. 531 (1982)). The buffer will need to be larger, of course, if the pecentage escrowed is based on past budgets rather than the specific annual budget since the calculations will necessarily be more imprecise.

The buffer could be determined by reference to traditional levels of spending as reflected in past budgets, and traditional levels of overspending budgetary prognostications. Should improper expenditures still exceed the escrowed amount they should be returned with interest. While this would still work a temporary loan such as the court found impermissible in *Ellis* v. *Railway Clerks*, 466 U.S. 435, 443, 104 S.Ct. 1883, 1889, 80 L.Ed.2d 428 (1984), it at least would be infrequent and inadvertent. It would satisfy, therefore, the "narrowly tailored" requirement.

As a separate matter, the 1986 Rule requires dissenting attorneys to object at the end of the year to specific activities they do not wish to fund. 1986 Rule, § C(2)(a), Official Translation at 21. The general objection filed initially acts merely as a "notice of the right to object," and no refund is made until the Review Board adjudicates the specific objections. 1986 Order, § C(3)(e), *id.* at 22-23. That, of course, violates the specific mandate of *Abood*, 431 U.S. at 241, 97 S.Ct. at 1802: "To require greater specificity [in objecting] would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure" (footnote omitted). Once it is determined how much was spent for the activities forecast in the budget that do not come under one of the permissible headings, all those who made general objections should automatically be refunded the proper proportion of their funds.

One of plaintiffs' complaints is not only that they must make specific objections, but that these objections and their subsequent adjudication are to be made public. 1986 Rule, § B(9), C(3)(a) Official Translation at 20, 22. As is apparent from the earlier discussion, the determination that a certain activity has been deemed objectionable by the Colegio (or, after a challenge, by the Review Board) must be made known to all members of the Colegio. However, the identity of the dissenters and of those who challenge particular allocations in the budget must not be made public.

While the plaintiffs also argue that the neutrality of the Review Board is suspect, the court refuses to entertain this argument. The Review Board is composed of former members of the Supreme Court of Puerto Rico, and other ex-judges. Such a board meets the requirements of an "impartial decision-maker," at least facially until appropriate evidence is presented to the contrary.

[5] Finally, the government collects the revenues from the judicial and notarial stamps and remits those revenues to the Bar Association without charging costs of administration and processing. Plaintiffs complain that their tax monies are in this way being used to support the Colegio. The 1986 Rule limiting expenditures of the stamp revenues to non-objectionable activities would adequately protect dissenters' right not to fund ideological activities.[15] If a future rule is approved that complies with the principles stated so far, it would also include such a limitation, and stamp expenses would not pose a problem. If, on the other hand, no such rule is forthcoming, plaintiffs' position with respect to the tax monies spent on

[15] As a practical matter, by simply substracting the dollar amount of stamp revenues from the *revenues* in the budget and an equal amount of *permissible* expenditures from the expenses side of the budget, before calculating the percentage of dues that must be refunded or escrowed, the Colegio can ensure that none of the stamp monies are spent on objectionable activities. We assume, of course, that objectionable activities can be funded *in toto* with the annual dues of non-objecting members, without making use of any income proceeding from dissenters' pockets, either through stamps or dues.

stamps will be radically altered. In this latter posture, as set forth below, plaintiffs would have no standing to challenge government spending to collect the stamp revenues.

Once the compulsory bar and stamp affixation schemes are held unconstitutional, they become essentially voluntary. Plaintiffs, as objectors, would presumably choose not to pay membership dues or purchase legal or notarial stamps. Once they make this choise, their only injury, and they admit as much in their post-trial memorandum, is the generalized injury suffered by all taxpayers a fraction of whose contributions are used to support this program. To claim relief, therefore, they must assert taxpayer standing.

These plaintiffs do not meet, however, any of the requisites for taxpayer standing. First, they challenge not a spending program, but the incidental expenses of regulating the Bar Association. *Compare*, *Flast* v. *Cohen*, 392 U.S. 83, 102-03, 88 S.Ct. 1942, 1953-54, 20 L.Ed.2d 947 (1968) ("It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute.") Second, *United States* v. *Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), and *Schlesinger* v. *Reservists' Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) "make it clear that a direct injury, and not merely a general interest common to all members of the public, is required for standing." C. Wright, *Law of Federal Courts*, 67 (4th Ed. 1983). Without further analysis, we conclude plaintiffs lack standing to challenge the use of tax money to collect and transfer to the Colegio the revenues from stamps.

[6] A seperate word is yet in order about stamp revenues, as opposed to the expenses incurred by the Secretary of the Treasury in collecting those revenues. The Bar Association argues that the stamp issue is moot because of the Puerto Rico Court's earmarking of stamp proceeds. The Court also notes Colegio Resolution No. 1 (September 3, 1983), designating stamp proceeds to the purchase of attorney life insurance.

Under the terms of this order, however, membership in the Bar becomes voluntary, and the Bar is under no *constitutional* compulsion to limit its activities in any way. No guarantee exists, therefore, that use of the stamp money will be curtailed to a particular kind of activity.

Faced with the same argument, the Supreme Court rejected it: "It is clear 'that voluntary cessation of allegedly illegal conduct does not moot a case.'" *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 305 n.14, 106 S.Ct. 1066, 1075 n.14, 89 L.Ed.2d 232 (1986) (quoting, *inter alia*, *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968)). As here, the defendant in *Hudson* was "free to return to his old ways," and would otherwise be granted "a powerful weapon against public law enforcement." *Ibid.* The court is not convinced that the Colegio has "satisf[ied] the heavy burden of persuasion which [the Court has] held rests upon those [making this argument]. *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203, 89 S.Ct. at 364.

Furthermore, and more importantly, the dissenters will obviously choose not to remain members of the Bar. To force *them* to pay for part of the members' life insurance, for example, is just another way of compelling support for the Colegio's activities. Even though the specific activity for which the money is earmarked is innocuous, the stamps would, in effect, be nothing but a levy imposed on dissenting attorneys for the benefit of those who choose to join the Colegio—now a voluntary association free to be political.

In addition, as long as the insurance benefits only members, earmarking those funds would be nothing more than the bookkeeping trick dismissed by the Supreme Court in *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 237 n.35, 97 S.Ct. 1782, 1800 n.35, 52 L.Ed.2d 261 (1977). Any funds from dissenters that relieved the members of even non-political expenses would merely free up additional assets for use in

ideological activities. This kind of support for the Colégio must, therefore, be enjoined, until adequate protection for objecting attorneys is put into place.

V. *Conclusion*

While all other aspects of the 1986 Rule appear to pass constitutional muster, it is apparent from the shortcomings just highlighted that the Rule fails to adequately protect dissenters' rights. In the absence of such protection, or until the Colegio ceases *all* ideological activities not germane to the purposes expressed in this opinion, compelled membership in the Colegio de Abogados is unconstitutional. Therefore, under the present circumstances, the Commonwealth cannot continue to make membership in the Bar, or its support, through the affixation of stamps, a precondition to the practice of law.

The court believes, however, that a remedy incorporating the features of the 1986 Rule not inconsistent with this opinion and additional safeguards in line with the principles expressed herein is feasible. The Court therefore will delay the entrance of judgment in this case for 60 days from the date of this order, to provide the Commonwealth with time to set in place such a remedial rule, if it so wishes. If the parties have not presented the court, before 60 days, with a scheme that meets the necessary requirements, the defendants will be prevented from imposing any negative consequences upon lawyers who fail to pay their dues or affix legal or notarial stamps to any legal document.

In conclusion, the court finds that Sections 3, 4, 10 and 11 of Law 43, and such part of Section 6 of Law 99 as deals with the notarial stamp, as well as the analogous provisions of Section 38 of that law, and all of Law 115, as interpreted, enforced and applied, are in violation of the basic guarantees of freedom of expression and association embodied in the First Amendment of the Constitution of the United States, and

therefore contravene either the First or the Fourteenth Amendment to that Constitution.[16]

The plaintiffs also request an award of damages for past infringements of their rights. Since no additional evidence has been introduced, the court is forced to come to the same conclusion it reached in 1983:

> There is no question but that the Colegio's actions have caused these Plaintiffs damages and that the Colegio's bad faith qualifies these damages for recovery pursuant to 42 U.S.C. § 1983. The problem, however, lies with a determination as to the amount to which said Plaintiffs are entitled. The evidence is too vague for the Court to establish through anything other than speculation, the amount of damages suffered by these Plaintiffs. Such conjecture would be contrary to good legal practice and is thus rejected. In view thereof, Plaintiffs are awarded nominal damages in the amount of $1.00 each against the Colegio.

Schneider, 565 F. Supp. 963, 979.

In view of the findings and conclusions set forth above, it is hereby ORDERED, ADJUDGED AND DECREED, on a date 60 days from the date of this opinion, and unless the court at that time orders otherwise:

> (1) That Sections 3, 4, 10 and 11 of Law No. 43 of May 14, 1932, as amended, of the Commonwealth of Puerto Rico (4 L.P.R.A. 774, 775, 781, 783), as interpreted, enforced and applied are hereby declared to be violative of the First or Fourteenth Amendments to the Constitution of the United States;
>
> (2) That Section 6 of Law No. 99 of June 27, 1956 of the Commonwealth of Puerto Rico (4 L.P.R.A. 1006),

[16] *See Examining Board* v. *Flores de Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976).

commencing with that part of the second sentence of the section which reads "and a stamp to be adopted" and continuing through the end of said section, insofar as it deals with Bar Association stamps, as interpreted, enforced and applied is hereby declared to be violative of the First or Fourteenth Amendments to the Constitution of the United States:

(3) That Section 38 of Law No. 99 of June 27, 1956 of the Commonwealth of Puerto Rico (4 L.P.R.A. 1038), where it reads "as well as the proper bar stamps of the Bar Association of Puerto Rico," as interpreted, enforced and applied is hereby declared to be violative of the First or Fourteenth Amendments to the Constitution of the United States;

(4) That, as of the effective date of this order, and until such time as the Colegio de Abogados de Puerto Rico ceases to engage in ideological and/or political activism, or sets in place an adequate protective mechanism in compliance with the First Amendment principles explained herein, all Defendants, except the Justices of the Supreme Court of Puerto Rico (*see In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982)), their agents, employees, subordinates, and all persons over whom control may be exercised by said Defendants are hereby enjoined and prohibited forthwith from:

(a) Prosecuting, harassing or in any manner taking action against any person licensed to practice law, including notarial law, for failure to pay directly or indirectly any due or fee prescribed by any law, regulation, practice or custom of the Commonwealth of Puerto Rico or of the Colegio de Abogados de Puerto Rico, that is intended to fund the Colegio de Abogados;

(b) From denying full legal validity to any pleading, public instrument or deed by reason of the failure of any person to adhere thereto, and/or cancel therein, any forensic or notarial stamps; and

(c) From denying or affecting the right of any person, otherwise duly qualified to practice law and/or engage in notarial practice by reason of their failure to pay any due or fee to the Colegio de Abogados de Puerto Rico, or by reason of their non-membership in said organization, or by reason of the failure or refusal of said person to purchase and use, in the relevant pleading or public instrument, any forensic or notarial stamp.

(5) That the Colegio de Abogados de Puerto Rico pay the sum of one dollar ($1.00) each to:

(a) Robert E. Schneider
(b) Hector Ramos
(c) Oreste V. Ramos
(d) Jorge F. Romany
(e) Jorge Souss

IT IS SO ORDERED.

APPENDIX A

Excerpt of Hearing Before Judge Torruella, July 8, 1987

THE COURT: Before you rest, I would like to say something for the record. I don't want any misunderstandings. I understand the record in this case to be the evidence that has been presented before the Court today and at the prior hearing. If it's not presented before this Court, it is not evidence unless I can take judicial notice, of course.

Secondly, there is a stipulation that has been referred to by plaintiff that is in the record that reads, "The plaintiffs and the Colegio stipulate that activities similar in nature to those undertaken by the Colegio prior to 1983 have continued." That is evidence.

I would like also to state for the record that in my opnion—which should speak for itself, but I would like to be sure that there are no misunderstandings—I stated on page 97 of 575 Federal Supplement—

MR. ANDUZE: 575, your Honor?

THE COURT: Yes, 575 Federal Supplement, at page 97 I stated, "Furthermore, there is no way of determining from an accounting standpoint footnote 24, testimony of Juan [Espiet], Colegio auditor, the dollar amount of this support—" talking about the support for ideological activities "—except to conclude that from the pervasiveness, scope and breadth of this type of activity it's obvious that the backing has been and is considerable."

I would also like to state for the record—

MR. ANDUZE: Excuse me, your Honor. You were referring to footnote number what?

THE COURT: Twenty-four. The Court, without any analysis on my part, reads, "Furthermore, there is no way of determining from an accounting standpoint the dollar amount of their support except to conclude that from the pervasiveness, scope and breadth have this type of activity it's obvious that the backing has been and is considerable."

Furthermore, I would like to state for the record—well, what is in the record Colegio has never presented any evidence before this Court before or—at [least] up to now—concerning any other activities engaged in by the Colegio.

MR. ANDUZE: What do you mean by "any other activities"?

THE COURT: The record is—the only record that I have before me is the evidence that has been presented up to now. I have no way of making any findings as to anything except what has been presented before me, at the last hearing and at this hearing.

MR. ANDUZE: Well, your Honor—

THE COURT: Let me finish.

MR. ANDUZE: I am sorry.

THE COURT: So I am asking you again if you—with what I have just stated if you have any other evidence to present to this Court?

MR. ANDUZE: Your Honor, the Colegio de Abogados has requested your Honor to take judicial notice of the June 26, 1986, opinion of the Supreme Court. In said opinion the Supreme Court makes an extensive analysis of the documentary evidence before that Court and before this Court. It makes an evaluation of the dollar amount of the activities that the Supreme Court found that may be ideological in nature or non-germane in nature, and the Supreme Court states very plainly that they are found to be [de minimus]. I agree with your Honor that even if they are [de minimus] they might be substantial.

THE COURT: Don't agree with me. I haven't said they were [de minimus]. As a matter of fact, I will also point out as part of my statement that the plaintiffs, as I understand at this stage of proceeding, are challenging the so-called remedy, they are challenging the validity of the 15 percent. As I read the cases—and this is also under issue—as I understand it, once there is a challenge made to that amount, the challenged party has the burden of proof of establishing before the challenged body, which is this one, the validity of that figure.

MR. ANDUZE: Well, your Honor, the problem is that you are [applying] to the this matter other cases that analyze a procedure that is being—that was followed or a system that was established by one of the litigant parties, and that was within the control of that litigant party.

THE COURT: Look, I understand your arguments on jurisdiction and all these other matters. I am stating for the record the way I see the case right now, and I am giving you the opportunity at this time to add any other evidence you feel is relevant to the way you see the case. I may be wrong after I read your motions and so on and so forth. This may all be academic but I don't want you coming in later and claiming you were not given the opportunity.

MR. ANDUZE: Your Honor, I appreciate your comments most definitely, and that's why I am trying to present this to the Court, because maybe the Court will be able to eliminate

me further as to any comments. Let—may I finish my statement, please?

THE COURT: Go ahead.

MR. ANDUZE: Sir, the reason I brought up the question of the procedure followed by the Supreme Court is that in the cases concerning the unions and the so-called free riders on all those cases that have to do within the context of union fees and dues, it was the union who was the party empowered and were controlled to establish the procedure.

Therefore, the Court can come and say, "you have the burden of showing this and this and that," but in this case the procedure, the remedy and the percentages and everything that is established is not established by the Colegio de Abogados. I cannot even if I show you 20 percent, 10 percent, 12 percent. It would be immaterial because it would not be within the realm of possibility for Colegio to change what the Supreme Court of Puerto Rico has established to be the remedy. We are in a different footing as to that possibility to a union, to a teachers association, to an air stewardess association, any of the other cases, railway employees, that are the groups that have been analyzed by the cases concerning the establishment of the remedy.

THE COURT: Maybe not all those cases are applicable to this situation. Maybe this is something altogether different.

MR. ANDUZE: Well, I think that they are guidelines as to the rights of the [dissenters], but the reality of the operational aspect of establishment of the remedy, I believe this is very much different because it is within the Supreme Court's judicial power and as exercised in the two opinions issued by the Court concerning the establishment of that remedy.

So what Mr. Schneider wants me to show is something that has no bearing as to this Court's decision, even if it had jurisdiction, even if it found that there was a case on controversy that the Court may decide. So that's why I understand it to be very important to make that distinction to the

Court that we are not in the same sutuation or same position as a union or a trade association with the power to amend or change or establish a remedy on our own volition.

THE COURT: Well, there is something else that I neglected to state. In view of the stipulation that has been entered into by the parties I don't know that it's necessary that I admit into evidence any of those documents that you brought today. After I issued the order I read the file, and I thought that maybe I shouldn't have issued the order.

MR. ANDUZE: Well, your Honor, the stipulation says what is a fact of life, the Colegio de Abogados has continued to conduct activities, continued to publish a law review, has continued to have activities in those regards, it has continued to do activities similar.

THE COURT: Well, the only reason—

MR. ANDUZE: Similar activities from 198[3].

THE COURT: The only reason I issued my order was to give you the opportunity to bring up to date the findings of the prior opinion. Now, there is no reason to clog up the records with a whole bunch of papers in view of that stipulation. I am telling you that I am not going to then require the submission of these documents because it's unnecessary in view of the stipulation.

MR. ANDUZE: Well, your Honor, the stipulation has said—

THE COURT: Whatever it says is in the record. All right, in view of what I said, are you going to offer any evidence?

MR. ANDUZE: No, your Honor.

THE COURT: All right, thank you. Other defendants?

MR. VAN DERDYS: No, your Honor. [We] join the position expressed by Brother Counsel Anduze.

THE COURT: All right.

APPENDIX I

CHIEF CLERK'S CERTIFICATE

I, Francisco R. Agrait-Llado, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation has been made by the Bureau of Translations of this Court under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on April 5, 1982, Case No. 0-77-431, *Bar Association of Puerto Rico* v. *Robert E. Schneider et al.*, the original of which in Spanish is under my custody in this Office. A Concurring Opinion of Justice Negron Garcia and an opinion issued by Justice Negron Garcia on June 16, 1982, disqualifying himself, are attached hereto.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand affixed the seal of this Court in San Juan, Puerto Rico, this 12th day of March 1991.

s/FRANCISCO R. AGRAIT-LLADO
FRANCISCO R. AGRAIT-LLADO
Chief Clerk
Supreme Court of Puerto Rico

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

No. 0-77-431

BAR ASSOCIATION OF PUERTO RICO,
PETITIONER
v.
ROBERT E. SCHNEIDER *et al.*,
RESPONDENTS.

COMPLAINT

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, April 5, 1982

The Bar Association of Puerto Rico filed a complaint before this Court against ninety-nine attorneys who had not paid the annual dues established according to law. We issued an order to show cause why the respondents should not be separated from the practice of law.

Most of the respondents paid the amounts owed. Two of them, Atty. Robert E. Schneider and Atty. Hector Ricardo Ramos Diaz, contend that the order issued by this Court is at variance with the Constitution of the Commonwealth of Puerto Rico. They requested time to substantiate their allegations. We granted the term.

Respondents' contentions boil down to the following:

(1) that the Legislature lacks the power to regulate the practice of law, inasmuch as this power is within the province of the Supreme Court of Puerto Rico;

(2) that they cannot be forced to become members of the Bar;

(3) that the provisions of Act No. 43 of May 14, 1932 (4 L.P.R.A. § 771 *et seq.*), establishing the payment of dues, is void because it violates the freedoms of speech and association; and

(4) that the amounts collected by virtue of the dues required as a condition to practice the legal profession, as well as those received from the compulsory purchase of notarial and bar stamps, are impermissibly used for purposes foreign to the Bar's duties.

We appointed a Special Master to receive whatever evidence the parties might wish to present. The Special Master rendered his report on September 9, 1980. He included a stipulation of the parties regarding the matters involved, as well as the evidence presented. The respondents do not point out which are specifically the Bar's activities they object to. After the corresponding briefs were filed, the case was taken under advisement in March 1981.

Let us now examine the many issues raised in this case.

1. *Structure and Regulation of the Practice of Law in Puerto Rico.*

The Bar Association of Puerto Rico was founded on June 27, 1840, through a Royal Decree of May 5, 1838, and the Royal Order of December 31, 1839. Todd, *Datos Historicos del Ilustre Colegio de Abogados de Puerto Rico*, I-l Rev. C. Abo. P.R. 81 (1935). In Spain, the Bar was known long before. The Madrid Bar, for example, was founded in 1596, and on November 23, 1617, by decree it was established that no attorney could practice law in Madrid unless he was a member of the Bar. Del Toro, *Un Siglo de Vida*, V-l Rev. C. Abo. P. R. 20, 21 (1940). The origin of compulsory membership of the Bar in Barcelona dates back to an earlier period. Letter of King Martin of April 22, 1399, whose text is reproduced in A. Garcia-Gallo, II *Manual de Historia del Derecho Espanol* 145 *et seq.*,3rd rev. ed., Madrid.

The Royal Decree of May 5, 1838, according to which were established the Bar Association of Puerto Rico and many others in Spain and its territories, also required that any per-

son interested in the practice of law in the region concerned had to become a member of the corresponding Bar. The Board of Governors determined the admission of the applicants, subject to review by a competent court. The bar itself in a general assembly, fixed the budget of expenses for each year and determined the amount each member had to pay. The Board of Governors also had ample disciplinary powers, subject to judicial review. For the text of the Royal Decree, see: II *Biblioteca de Ultramar*, 231 *et seq.*, Madrid, Imp. de Alegria y Charlain (1844).

Compulsory membership existed in Puerto Rico until it was suppressed by General John R. Brooke during the United States Military Government on the Island. U.S. Department of War, *General Orders and Circulars, 1898-1900*, G.O. 20 of December 3, 1898. Instead of the Bar Association of Puerto Rico, it established a colorless entity, which was voluntary and which led a precarious life until the present Bar Association was created by Act No. 43 of May 14, 1932 (4 L.P.R.A. § 771 *et seq.*).

The Bar constituted by Act No. 43 was declared successor of the two juridical entities that preceded it. Its creation was conditioned to having a majority of the persons entitled to practice law before the Supreme Court of Puerto Rico accept it in a referendum.

Act No. 43, which was endorsed in the referendum, impose on the Bar Association the following obligations, among others: "to cooperate in the improvement of the ministration of justice," "to render such reports and give such advice as the Government may require of it," "to defend the rights and immunities of lawyers," and "to maintain healthy and strict professional morals among the members." 4 L.P.R.A. § 772. Among its powers, we find those of adopting, with the approval of the Supreme Court, the canons of professional ethics that shall govern the conduct of lawyers; to institute disbarment proceedings before this Court; to create mutual-aid

funds, insurance systems and special funds; to organize a foundation to "implement its programs of service to the community and the profession"; and "to exercise such incidental powers . . . as may be necessary or advisable to the end of creating the Bar Association." 4 L.P.R.A. § 773.

Article 3 of the Act, 4 L.P.R.A. § 774, provides that "no person who is not a member thereof [of the Bar] shall practice law in this Commonwealth." Article 9 authorizes the Bar Association to fix the annual dues to be paid by its members, which shall be approved by a majority of the members present at a general assembly of the institution. 4 L.P.R.A. § 780. Article 10 provides that "Any member who fails to pay his dues, though otherwise qualified as a member of the Association, shall be suspended as such member, but may be reinstated on payment of his debt on this account." 4 L.P.R.A. § 781.

The Bar Association's funds come mainly from the above-mentioned annual dues, from the Bar stamp every lawyer must affix to the initial document he files in any judicial proceeding, 4 L.P.R.A. § 783, and of the proceeds of the notarial and other stamps adopted by the Bar Association according to the Act. See Act No. 115 of May 6, 941 (4 L.P.R.A. § 785).

[1-4] Respondents' argument that the Legislature of Puerto Rico lacks the power to order the integration of our Bar, as it did in 1932, lacks merit. As we have mentioned many times, it is true that admission to the practice of law is a function inherent to this Court, and that the legislation approved on this matter—such as Act No. 43—"is only advisory, not binding, on us." *In re Bosch*, 65 P.R.R. 232, 234 (1945); *Guerrero* v. *Court of Tax Appeals*, 60 P.R.R. 236 (1942); *Ex parte Jimenez*, 55 P.R.R. 51 (1939); *In re Rodriguez Torres*, 106 D.P.R. 698, 749-50 (Mr. Justice Negron Garcia, dissenting on other grounds); Arroyo, *Facultad de la Rama Judicial para Reglamentar la Profesion Legal*, 20 Rev. Jur. U.P.R. 38 (1950). Preeminence of the judicial action in this field—which

naturally includes the power to pass on whether or not a bar in a jurisdiction must be unified and under what conditions—does not mean that the legislation on these matters, which is not in conflict with the rules established by this Court, is void. Act No. 43 is perfectly valid when it establishes compulsory membership of the Bar in Puerto Rico.

[5] Act No. 43 meets a legitimate public purpose. It revived one of our most ancient and respected institutions, which has an unquestionable value not only for the benefit of the strict interest of a class, but also for the good operation of justice in our country and the social advancement of the community. Institutions such as the Bar Association—the Legislature has extended the compulsory membership to many other groups—fulfill a very special mission in our society. Contrary to the strongly pluralistic character of North American society, our milieu has traditionally been monolithic, lacking the many independent voices that make such great contributions to the health of the democratic way of life.

In different parts of the United States the concept of integration of the bar has had a history different from ours.[1] The concept began to spread in the twentieth century, but from 1921 until this action was instituted, thirty-two states, together with the Virgin Islands and the District of Columbia, have unified their bars and required compulsory affiliation. Reynolds, *Compulsory Bar Dues in Montana: Two (and a Half) Challenges*, 39 Mont. L. Rev. 268, 290 *et seq.* (1978).

In many cases, the integration has been carried out by legislative action, and in others by rulings of the higher state court either through an expressly conferred power or in the exercise of its inherent power. For examples of this last modality see: *In re Integration of the Bar*, 432 P.2d 887, 888 (1967);

[1] The idea was originally proposed by Herbert H. Harley, founder of the American Judicature Society, who found his primary support in the English and Canadian experience. North Dakota was the first state to unify its bar (1921). J. Parness, *Citations and Bibliography on the United Bar in the United States*, American Judicature Society Report, Chicago, 1973.

Application of the President of the Mont. Bar Ass'n, 518 P.2d 32 (1974); *Petition of Rhode Island Bar Ass'n*, 306 A.2d 199 (1973); *Petition of Tennessee Bar Ass'n*, 532 S.W.2d 224, 229 (1975); *In re Washington Statm Bar Ass'n*, 493 P.2d 1237 (1972); Jeffers, *Government of the Legal Profession: An Inherent Power Approach*, 9 St. Mary's L. J. 385 (1978).

[6] The courts' inherent power in this field is so great that, even in the presence of a statute expressly prohibiting compulsory membership the judicial power has been exercised to provide exactly the contrary. *In re Integratlon of State Bar of Oklahoma*, 95 P.2d 113 (1939). See: *Petition of Tennessee Bar Ass'n, supra.* Statutes ordering that membership dues be included in the general state funds, subject to specific appropriation by the Legislative Assembly, were declared null. *Sharood* v. *Hatfield*, 210 N.W.2d 275 (1973).

We find no grounds whatsoever to deny the Legislature the power to revive the ancient Bar Association of Puerto Rico, founded so many years ago.

2. *Constitutionality of Compulsory Membership.*

We shall only consider in this section the problem of the constitutionality of compulsory membership. For the time being we shall make no reference to the relationship between the use given to the compulsory dues and the freedom of speech.

[7] The compulsory membership of lawyers, either through parliamentary or court action, has ample constitutional grounds. The same happens with the imposition of dues. The power of *raison d'etat*, in the case of legislative assemblies, and the courts' inherent power within our juridical system to look for the welfare of justice, have offered an ample basis to justify the unification of the bar and the adoption of measures for the support of the resulting institution. No citation has been brought to our attention, nor have we found any decision invaildating the concept of compulsory membership.

On the contrary, there are many North American cases rejecting the contention—made herein—that an attorney cannot be forced to become a member of a professional association whose purposes he opposes. See: *In re Scott*, 292 P. 291 (1930); *Kelley* v. *State Bar of Oklahoma*, 298 P. 623 (1931); *Application of the President of the Mont. Bar Ass'n*, *supra*. In *Lathrop* v. *Dohohue*, 367 U.S. 820 (1961), the United States Supreme Court upheld the constitutionality of the plan for the integration of the Wisconsin Bar.

The singular socio-political circumstances of Puerto Rico which we have already mentioned buttress even more the constitutionality of Act No. 43. The public interest in the creation of a strongly pluralistic society, in furtherance of the practice of law and of the good operation of the judicial system, outweighs the personal inconveniences that compulsory membership might entail. The right not to assemble, which can be derived from the opposite right consecrated in the Constitution of the Commonwealth, Art. II, Sec. 6, gives in before the above-mentioned interests, of such a clearly urgent nature under the Puerto Rican constitution. On different occasions we have examined this legislation and have accepted it as "satisfactory legislation to aid this court in regulating admissions to the bar and the conduct of its members" and we have expressly decided that "in order to utilize the privilege which we grant a lawyer to practice in our courts he must . . . be enrolled in the Association...." *In re Bosch*, 65 P.R.R. 232, 235 (1945). In *Bar Ass'n* v. *Fajardo*, 51 P.R.R. 512 (1937), several lawyers who had failed to pay their dues were suspended until payment thereof.

[8-9] We decide that the Constitution of the Commonwealth, in force since 1952, does not affect the principle embodied in art. 3 of Act No. 43 (4 L.P.R.A. § 774) to the effect that no person shall practice law in this jurisdiction if he is not a member of the Bar Association of Puerto Rico. The obligation to pay the corresponding dues is also constitutional. *Bosch* and *Fajardo* are unchanged with regard to the subject

under discussion herein. Up to this point, we have analyzed the validity of compulsory membership or of compulsory payment of dues and cancellation of stamps. Further on, we shall examine the use to which such funds are destined.

Before delving into this distinction, we should pronounce ourselves on the constitutional scope of action of the Bar Association of Puerto Rico.

3. *The Bar Association's Scope of Action.*

We examine this question only in order to adequately frame the problem that we will discuss later on: whether or not a member has the right to object to the use given to the funds he personally contributes. As it appears from the briefs, there is some confusion as to what the Bar Association may or may not do, and as to the relation between this matter and the right to raise objection against the use of funds for a specific purpose. Since the record is short of information with regard to this point, we will limit ourselves to state the general principles governing this field, without attempting to define the complete scope of the Puerto Rican Bar Association's right to freedom of speech.

We must, first of all, point out that the historical role of many of the ancient Bar Associations that influenced the development of others within the civil law tradition, was not that of being mere guilds immersed in the defense of their class interests. On the contrary, in France, whose experience echoed in many other countries, the Bar's role was, from time immemorial, a primarily political one. The Bar took active part in the country's principal political movements, both before and after the Revolution. It was suppressed on August 17, 1789, and gained new life in 1804. A. Young, *A Historical Sketch of the French Bar*, Edinburgh, 1869. Se: G. Massonies *La Jurisdiction du Barreau*, Paris (1912); J. Gueydan, *Les avocats, les defenseurs et les avoues de l'Union Francaise*, Paris

(1954). Spanish Bars were suppressed on several occasions by governments that were against the liberties they professed. During the early nineteenth century, each time an absolutist government was restored, compulsory membership to the bar was generally suppressed. VII *Enciclopedia Juridica Espanola* 71, Ed. Seix, Barcelona, n.d.

[10-12] Under our judicial system, it is evident that the Bar Association of Puerto Rico may engage in any activity authorized by the Legislature of Puerto Rico or by this Court, provided such activity is rationally linked to the purposes expressed in Act No. 43 or in the order this Court shall issue on its day, if it so determines on petition of party or on its own motion. Furthermore, the Bar Association enjoys, as an artificial person, ample freedom of speech under the provisions of Art. II, Sec. 4 of the Constitution; this freedom is at least as ample as that allowed in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). In the case of Puerto Rico the Bar Association need not be a quiet and blushing entity, afraid to use the voice granted to it by the very pluralistic purpose it should serve, although such is not its only *raison d'etre*. In *Bellotti*, the Court said at 784:

> We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.

The freedom of speech of the Bar Association, in representation of the majority of its members, cannot be curtailed by dissident members. See: *Buckley* v. *Valeo*, 424 U.S. 1 (1976). They enjoy their own freedom of speech. The nexus between the latter's freedom of speech and the way of using certain

funds of the Bar constitutes a separate problem. We shall discuss it in the next section.

4. *The Bar Association's Use of Compulsory Contributions.*

The first thing to settle with regard to this issue is whether the record of this case adequately raised the constitutional problem of the relationship between a dissident member's freedom of speech, and the use of his contributions for purposes he does not share.

The record does not show the specific activities the respondents object to, nor that part of their contributions which are devoted to the same. We deem, however, that these deficiencies do not relieve us from going into the constitutional problem.

This has been the conclusion reached by the United States Supreme Court in similar cases. In *Lathrop* v. *Donohue*, *supra*, which case dealt with compulsory membership of lawyers and the imposition of dues to support the resulting institution, five justices deemed, despite the terse record before them, that the constitutional problem should not be sidestepped, although they differed as to the solution. To this effect see the reference to *Lathrop* in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 233 (1977). See also: *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961); *Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113 (1963); *Railway Employers' Dept.* v. *Hanson*, 351 U.S. 225 (1956). In *Allen*, the following general allegation was deemed to be sufficient:

> [Sums] exacted under the Agreement "have been and are and will be regularly and continually used by the

defendant Unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs. At 118.

The allegations of the dissident members in this case are sufficient to raise the constitutional issue.

Lathrop has been cited as authority for the proposed rule that a dissident's freedom of speech does not affect the Bar Association's use of the funds such person has contributed. *Lathrop* constituted an authority for the constitutionality of compulsory membership, but the plurality of justices who subscribed the opinion of the Court refused to make a pronouncement on the constitutional issue before us regarding freedom of speech. 367 U.S. 830, 845. The interpretation in *Lathrop* is affirmed in *Abood*, *supra* at 848.

In *Abood*, however, the United States Supreme Court directly addressed the problem now before us. In that case, the appellants were government employees who refused to pay dues to a union they had to contribute to under an agency shop clause, although they objected collective bargaining in the public sector and the union's use of substantial amounts to support political issues. In *Abood*, the Court held that the above-mentioned clause of the agreement did not violate the freedom of speech guaranteed by the First and Fourteenth Amendments, nor the right to assemble, as long as the dues were used for labor purposes. If the funds were used for political or other ideological purposes, the Court determined that the Union was entitled to use the fund therefor, but that it could not constitutionally employ the funds of such persons who did not agree with such uses.

The rule laid down in *Abood* cannot be limited to the labor situation that the Court had before its consideration. The rule is wider and affects the very definition of the scope of the First Amendment to the Constitution of the United States. L. Tribe, *Constitutional Law* 589-90, 899, The Foundation Press, Inc. (1978). Although the United States Supreme Court has not made a direct pronouncement on the matter, several commentators have mentioned the connection between *Abood*

and the use of compulsory dues paid by dissident members of integrated bars for certain purposes. Parker, *First Amndment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-examined*, 22 Ariz. L. Rev. 939 (1980), Reynolds, *Compulsory Bar Dues in Montana: Two (and a Half) Challenges*, *supra*; Kamenshina, *The First Amendment's Implied Political Establishment Clause*, 67 Cal. L. Rev. 1104 (1979).

[13-15] *Abood* means that the freedom to contribute to political causes implies the freedom of not contributing. When we transcend the frontier of the activities most intimately linked with the practice of law and the administration of justice, we enter a zone of freedom of conscience where the weight of the interests involved undergoes a radical change. Consequently, we decide that the sense of the freedom of speech clause contained in Art. II, Sec. 4 of the Constitution of Puerto Rico is not narrower than that given by the United States Supreme Court to the First Amendment in this context. Compulsory membership is constitutional. Compulsory dues, established by the majority of the members as a condition to practice law in Puerto Rico, is also constitutional. In addition to this, the Bar Association may constitutionally pronounce itself on ideological matters. On the other hand, lawyers who dissent from such pronouncements—and not those who object to the Bar Association's performance of its statutory purposes or of those imposed by this Court—enjoy, under the Constitution of Puerto Rico, the right to raise objection to the use of their contributions or of part thereof for ideological activities they do disapprove. Such disapproval may be of a general nature, as it was expressed in *Allen* and in *Abood*.

The recognition of a dissident member's freedom of speech is not sufficient to settle the controversy before us. We must still formulate the adequate remedy within the circumstances involved, to enforce said right.

5. *The Remedy.*

Street, *Allen*, and *Abood* lay down some general guidelines for designing the proper remedy, but make no definitive pronouncement on this prickly problem.

[16] The record in this case, which allows for the discussion of the constitutional issues we have examined, but which hampers the drafting of a remedy, moves us to fix a procedure to facilitate and promote, within certain parameters, the formulation of a rule by the very Bar Association, as it happened in *Abood* at the initiative of the union concerned. To such effect we would provide:

> a) The Bar Association, not later than the date set for collecting the next annual dues and after giving the members an opportunity to express themselves on the matter, shall devise a method to ascertain that contributions of a dissenting member shall not be used for ideological purposes.
>
> b) The method will require that all objections of this nature be affirmatively expressed on the date of payment of dues. Absence of timely objection shall be taken as an authorization to the Bar Association to use the contributions for that year according to the general budget.
>
> c) The method shall duly follow the principles laid down in *Street*, *Allen* and *Abood*.
>
> d) The method shall include the member's selection of a Board composed of renowned attorneys who, among other functions, pass on, subject to review by this Court, the classification of the activities of the Bar Association, the proportion between the ordinary activities and the ideological ones, the validity of the objections a member may raise against certain activities, and over any other controversy arising from the remedy and its application.
>
> e) The method shall attempt to strike a proper balance

between the dissident members' freedom of speech and the need, so fundamental in Puerto Rico, to keep a strong Bar Association, loyal to its tradition and historical functions, and financially sound.

f) The method shall not allow any member to violate art. 10 of Act No. 43 (4 L.P.R.A. § 781), or other statutory provisions related to the organization and operation of the Bar Association. Any member, whether or not legitimately dissenting from the use of his contributions or of part of them for ideological purposes, shall pay on the dates fixed, the contributions required by the law or that this Court may timely authorize. Such payment shall in no way affect their right to the remedy that shall be established pursuant to our present opinion.

g) Until the above-mentioned remedy is implemented, the respondents shall pay the amounts due to the Bar Association within fifteen days from service of notice of this opinion. If they fail to do so, they shall be suspended from the practice of law in Puerto Rico from the date said term expires until the moment they pay the above-mentioned debts.

h) On the other hand, bearing in mind the respondents' freedom of speech, the Bar Association shall —until the remedy is implemented— deposit in a separate account an amount equivalent to the proportion between the sums destined to ideological purposes —as the term may be temporarily understood by the Board of Governors— and the total expenses of the Bar Association. A similar sum shall be added to the first one, which sum shall be taken from the contributions made according to law by non-dissenting members, and the resulting amount shall be used exclusively for the ordinary endeavors of the Bar Association. In this way we shall prevent that the respondents' contributions to the Association's ordinary expenses be disproportionate.

Judgment shall be rendered accordingly.

Mr. Justice Negron Garcia issued a concurring opinion.

IN THE SUPREME COURT OF PUERTO RICO

No. 0-77431

BAR ASSOCIATION OF PUERTO RICO,
PETITIONER
v.
ROBERT E. SCHNEIDER ET AL.,
RESPONDENTS

COMPLAINT

MR. JUSTICE NEGRON GARCIA, concurring.

San Juan, Puerto Rico, April 5, 1982

Once the more or less heated debates this bona fide matter might stir have been overcome, we must recognize, in strictly legal terms, the constitutionality of compulsory membership. We propose and hold the vision that the institutional unity of attorneys is a legitimate purpose for the practice of law, *imperative*, *consubstantial* and *immersed* in the guiding axiom enshrined in Art. V of our Fundamental Law creating "a unified judicial system for purposes of jurisdiction, operation, and administration." Sec. 2. Although the document of the Constitutional Convention is silent with regard to this matter, the same shows that the whole extensive debate regarding the Judicial Power was prompted and stimulated by the ideal of achieving an efficient administration of justice. 4 *Diario de Sesiones* 2608-2614 (1961). Furthermore, the Bar Association was one of the organizations that, institutionally and through its members, more contributed to the discussion, analysis and drafting of our Constitution. We need not strain our minds to understand that the association in question, and the regulation of the practice of law, are inexorably linked to this efficient undertaking in *furtherance* of justice. Hence, it is impossible to separate one from the other; *an integrated judicial system* is the marrow of constitutional operational dynamics, and goes

hand in hand with the *integrated regime of compulsory membership*. It is part of and is congruent with the more transcendental mandate and parliamentary scheme which must necessarily yield to the also important concept of an *unconditional* right to assemble.

Integration of the legal profession is a method that guarantees that the best ethical postulates shall be implemented. Itis buttressed on the state's police power to require membership of those who are interested in and desire to practice a profession. In view of the evolution of contemporary thought, nobody questions the need that admission to the bar —and to so many other trades and professions—entail a certain education, preparation, academic background, and intellectual and moral conditions. How then to object compulsory membership when the Legislative or Judicial Power have thus provided in order to further a public interest and as a means to attain continuity in such attributes?

Based on the foregoing constitutional scheme, we endorse the opinion of the Court upholding the validity of the compulsory membership ordered by the Legislature in Act No. 43 of May 14, 1932 (4 L.P.R.A. § 771 *et seq.*) —particularly directed to aid the inherent power of this Court— "to regulate the legal profession.... Countless decisions before and after the approval of the Constitution hold that 'The removal, as well as the admission to the practice of law is an inherent power of the Supreme Court of Puerto Rico.' *In re Liceaga*, 82 P.R.R. 245, 248 (1961); *In re Andreu*, 81 P.R.R. 87, 117 (1959); *In re Pagan*, 71 P.R.R. 712, 714 (1950); *In re Abella*, 67 P.R.R. 211, 219 (1947); *In re Gonzalez*, 65 P.R.R. 357, 367 (1945); *In re Bosch*, 65 P.R.R. 232, 234 (1945); *In re Arroyo*, 63 P.R.R. 764, 766 (1944); *Guerrero* v. *Court of Tax Appeals*, 60 P.R.R. 236, 244-247 (1942); *Ex parte Jimenez*, 55 P.R.R. 51 (1939); *In re Tormes*, 30 P.R.R. 248, 249 (1922). The fundamental reason for this doctrine was clearly expressed in *In re Diaz*, 16 P.R.R. 79, 88 (1910): 'The mission of attorneys at law in

society is of great nobility, because they are called upon to assist in the honest administration of justice. Not only the parties interested in the proceedings, but the courts themselves trust in them." Recently we reaffirmed that '[h]is mission as such is not limited merely to represent private interests—in this case his own— but to be a legal and efficient instrument in the administration of justice and order in our society.' *Martinez Rivera* v. *Sears, Roebuck*, 98 P.R.R. 629, 639 (1970)." (Footnote deleted.) *In re Rodriguez Torres* 106 D.P.R. 698, 748-749 (1978)- dissenting opinion.

As any other human institution, the Bar Association is not infallible. Its past or present mistakes, the annoyance of some of its members before its public pronouncements, do not justify its elimination in a pluralistic society such as ours. There are sufficient and alternate remedies to do away with excesses. The guidelines adopted today by this forum are part of the different minimum avenues to achieve that end and to protect the opinion and financial contribution of dissident members, be they a majority or a minority. We must understand that the petty rivalries or political passions that take place in this type of entity, the rejection of groups that often, whether or not they are correct, proclaim themselves the speakers of the whole membership, are simply the risks inherent and natural to the dynamics of all groups that are open to any stand or criticism. They are not overwhelming reasons sufficient to destroy an institution that is deeply rooted in Puerto Rican society and which has historically distinguished itself as an open and free forum that has protected many worthy causes.

Neither is it sufficient to promote and exchange its disappearance through the inevitable advent of *voluntary* associations, held together not by the motto "Honrando La Toga" ("Honoring the Legal Profession"), but grounded on the different ideologies of the politico-partisan repertoire of the country. This would create serious difficulties and would

undermine this Court's supervising and controlling functions, aside from causing an even more profound division in our already polarized society. The search for truth and of solutions snaps when discussion channels are closed.

> We should not forget that all democratic systems of government rest on the free exchange of ideas. History teaches us that where said right is curtailed a crisis of common sense has intervened beforehand.
>
> > "What should be understood by crisis? 'Crisis is a peculiar historical change,' states Ortega. It is a change that consists 'in that the world where one lived has come to an end: man is left without his previous convictions; without a world. It is a change that is negative at the beginning—critical. One does not know what to think next—one only knows, or thinks one knows, that traditional ideas are false, inadmissible. A profound distaste is felt for everything or almost everything that was previously held as true; but the truth of the matter is that one does not yet possess any new positive beliefs to substitute for the traditional ones. Since that system of convictions or world was the framework in which man was permitted to walk with certain security among things, and now has no such framework, man once again feels lost, confused, disoriented.' In critical times man 'lives between two beliefs, without fitting in neither.' Heras, [*Curso de Derecho Constitucional*, 1957], at 177."

Freedom is like water: we notice its necessity when we do not have it, but, in excess, it drowns us. Only moderation comforts the soul and soothes the body. *Ortiz Anglero* v. *Barreto Pérez*, 110 D.P.R. 84, 113 (1980) (concurring opinion).

This call to common sense, to moderation, to tolerance and to mutual respect between those who integrate the legal forum, and particularly those who are devoted paticipants of its internal matters, is the present challenge of the present and future generations of lawyers, and is an example that should shine over and extend to all society. The more lawyers there are, the greater shall be the challenge as well as the need for compulsory membership of the Bar Association as a common denominator and means to discharge such a noble profession, and to enable this Court to efficiently discharge its disciplinary power for violations to ethics, and to administer the unified judicial system.

A-241

IN THE SUPREME COURT OF PUERTO RICO

No. 0-77-431

BAR ASSOCIATION OF PUERTO RICO,
PETITIONER
v.
ROBERT E. SCHNEIDER *et al.*,
RESPONDENTS

COMPLAINT

MR. JUSTICE NEGRON GARCIA, disqualifying himself.

San Juan, Puerto Rico, June 16, 1982

Today, for the first time, the undersigned justice found out[1] that in the voluminous record of the above captioned case—commenced on November 21, 1977, through a petition signed by the then President of the Bar, Atty. Graciany Miranda Marchand, and that, as of today, has two parts of more than five hundred (500) pages and annexes, where many (thirty-seven (37))lawyers signed different documents on different dates—the name of his brother Arturo Negron Garcia appears typewritten in a list of fifteen (15) additional lawyers at the end of one of the Bar Association's memorandums. It is

[1] Because he was summoned this morning as a member of this Court which was sued in an action for declaratory judgment, injunction, and damages filed on June 11, 1982, before the United States District Court for the District of Puerto Rico, in case No. 82-1459, filed by Robert E. Schneider, Jr., and Hector R. Ramos Diaz. There, on p. 19, title 48(u) it says: "That all the justices are active members of the Colegio and, on information and belief, a majority of the Justices, at some time, have acted on the governing board of the Colegio or have otherwise participated in its affairs and activities. Associate Justice Antonio S. Negron Garcia, who wrote a separate opinion concurring with the Ruling of the Supreme Court, *is the brother of Arturo Negron Garcia who is listed in the Colegio's Brief as one of the lawyers for the Colegio* and is a candidate for President of the Colegio." (Emphasis supplied.)

only in this document signed by attorneys Graciany Miranda Marchand and Raul Serrano Geyls, that his name is mentioned in an isolated, plural, and incidental manner. We had not become aware of this fact.

Since we were not aware of this fact, nor did we have, at any of the stages of this proceeding, the benefit of an express and timely indication to that effect by the parties or by any other person, we participated in the decision on the merits and signed a separate opinion concurring with the unanimous decision of the Court upholding the constitutionality of the statute on compulsory membership. We also took part in the later proceedings for partial execution.

Regardless of our firm and reiterated constitutional criterion to that effect, grounded on strict and well-meditated legal conscience—which rejects any foreign notion, idea or situation that is not directed to the moderate and objective performance of full justice, and which transcends our condition as member of the Bar, or any family ties—the rule has always been to disqualify ourselves sua sponte whenever there is, and we learn of any circumstance that so warrants, or if any of the protagonists directly or indirectly involved, so justifies. *Santiago* v. *Superintendente de la Policía*, 112 D.P.R. 205 (1982), vote of disqualification; Resolutions of June 15, 1982, cases Nos. 0-82-358 and 0-82-367, *E.L.A.* v. *Pueblo International, etc.* Faithful to such spirit, for the sake of procedural integrity, and observing a strict interpretation of the Canons of Judicial Ethics, we hereby disqualify ourselves from further participation in this case.

The Chief Clerk shall immediately certify and serve notice of these presents on the parties' attorneys and on the Bar Association, for its timely publication.

APPENDIX J

CHIEF CLERK'S CERTIFICATE

I, Francisco R. Agrait-Llado, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation has been made by the Bureau of Translations of this Court under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on June 26, 1986, Case No. 0-77-431, *Bar Association of Puerto Rico* v. *Robert E. Schneider, et al.*, the original of which in Spanish is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 12th day of March 1991.

s/FRANCISCO R. AGRAIT-LLADO
FRANCISCO R. AGRAIT-LLADO
Chief Clerk
Supreme Court of Puerto Rico

IN THE SUPREME COURT OF PUERTO RICO

No. 0-77-431
Professional Conduct

BAR ASSOCIATION OF PUERTO RICO,
PLAINTIFF,

v.

ROBERT E. SCHNEIDER, et al.,
DEFENDANTS.

CHIEF JUSTICE PONS NUNEZ DELIVERED THE OPINION OF THE COURT.

SAN JUAN, PUERTO RICO, JUNE 26, 1986

I

IN 1982, in an opinion of Chief Justice Trias Monge, this Court held, *inter alia*, that: Act No. 43 of May 14, 1932, which creates the illustrious Bar Association of Puerto Rico (Bar Association); compulsory bar membership; the imposition of dues; and the statutory provision that compels attorneys to cancel stamps and pay dues to the Bar Association, are constitutionally valid. We also decided that the Bar Association may engage in any activity authorized by the Legislature of Puerto Rico or by this Court, which activity is rationally linked to the purposes laid down in Act No. 43, *supra*, or in the order that this Court may issue on its day; that the Bar Association enjoys full freedom of expression under the provisions of Art. II, Sec. 4, of the Constitution of the Commonwealth of Puerto Rico, and that the Bar Association's freedom of expression, in behalf of the majority of its members, cannot be curtailed by dissenting bar members. This Court decided further that by reason of its freedom of expression the Bar Association

may, constitutionally, pronounce itself on ideological matters, but that the members who dissent from such pronouncements are entitled, under the Constitution of Puerto Rico, to object to the use of their contributions or of part thereof for the ideological activities they do not approve.

As a consequence of the foregoing, we decided that an adequate remedy was necessary to enforce the dissenting members' right not to contribute money to pronouncements or activities of an ideological nature. To such ends, the Court set up a procedure to allow the Bar Association itself to structure the proper remedy. See *Colegio de Abogados de P.R. v. Schneider*, 112 D.P.R. 540 (1982).

Later, on May 6, 1982, we issued a resolution retaining our jurisdiction in the case to take cognizance of matters dealing with that part of our judgment that refers to the remedy. We also retained jurisdiction to approve, modify, or disapprove the remedy the Bar Association could finally structure. In June 1982, we suspended attorneys Robert E. Schneider and Hector Ricardo Ramos Diaz from the practice of the legal profession for failing to comply with that part of our judgment which ordered a temporary payment of dues to the Bar Association until the remedy was finally devised.

Attorneys Schneider and Ramos then filed with the United States District Court for the District of Puerto Rico (Federal Court), an action on Declaratory Judgment and Injunction and Damages against the Bar Association, the Commonwealth Secretaries of Justice and of the Treasury, and the Justices of this Court[1] which action was based on the alleged unconstitutionality of Act No. 43, *supra*, of compulsory bar membership and of the obligation to cancel stamps and pay dues to the Bar Association.

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[1] Later on, by decision of the Court of Appeals for the First Circuit, the action against the Justices of this Court was dismissed, although the Justices were retained as nominal parties in their administrative character as to the causes of action challenging the cancellation of notarial and bar stamps. *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982).

On June 25, 1982, the Bar Association filed an informative motion before this Court giving its conception of what were ideological activities. In December 1982, it submitted the remedy it had structured pursuant to our judgment.

After elucidating several procedural incidents and collateral issues, on June 16, 1983, in an opinion of Chief Judge, Hon. Juan R. Torruella, and before this Court had pronounced itself on the remedy devised by the Bar Association, the Federal Court held that the remedy was a "sham," that secs. 3, 4, 10, and 11 of Act No. 43, *supra*, part of sec. 6 of Act No. 99 of June 27, 1956, and part of sec. 38 of said Act No. 99, as well as Act No. 115 of May 6, 1941 (4 L.P.R.A. § 785), as applied, enforced and construed, violated the provisions on freedom of expression and of association contained in the First Amendment to the Constitution of the United States, and were contrary to the Fifth and Fourteenth Amendments to said Constitution. Due to said decision, and until the Bar Association ceased to hold such activities, the Federal Court issued an injunction barring any type of disciplinary measures against bar members for failing to pay their dues, barring infringement of a person's right to practice law for failure to pay such dues or for not being a member of the bar, barring the use of funds and public facilities for selling bar stamps for the benefit of the Bar Association, and barring further that validity be denied to any pleading, public instrument, and deed for the failure to affix and cancel bar or notarial stamps on such documents. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F.Supp. 963 (1983). Said Court refused to stay the effectiveness of the injunction while the Bar Association was seeking appeal from said judgment before the United States Court of Appeals for the First Circuit, *Schneider* v. *Colegio de Abogados de Puerto Rico*, 572 F.Supp. 957 (1983).

Upon issuing the unconstitutionality decree, the Federal Court essentially limited its findings of fact to those it deemed more ideological or politico partisan activities, but failed to describe or to make any determination with regard to other

activities held by the Bar Association, or to the proportion of resources devoted to ones or the others.

When the case was brought before the United States Court of Appeals for the First Circuit, said Court stayed the injunction and reversed the Federal Court's decision. *Romany* v. *Colegio de Abogados de P.R.*, 742 F.2d 32 (1st Cir. 1984).

In so doing, the First Circuit stated that this case required the Federal Court's abstention, that is, the exercise of the federal jurisdiction should have been stayed until this Supreme Court could provide a remedy, or before that in case of an unreasonable delay. The First Circuit also held that this Supreme Court should provide, if it was willing to do so, an immediate temporary remedy to safeguard the rights of the parties until a permanent remedy was structured and the parties' claims were given a definitive solution.

On November 13, 1984, we issued an order providing a temporary remedy. On that same date we ordered a hearing to give the parties the opportunity to bring evidence. This Court appointed the Hon. Mariano Ramirez Bages (the Special Master), former justice of this Court, to preside over the hearing.

We later reinstated Scheider and Ramos to the practice of the legal profession in view that they had opted for the temporary remedy decreed.

On January 4, 1985, a prehearing conference was held before ex-Justice Ramirez. At the hearing, attorney Hector Marquez, on his own behalf and on behalf of the respondents, attorneys Oreste Ramos Diaz, Jorge Romany, and Jorge Souss, filed a motion asking to be relieved from further participation in the case. The petition was granted and proceedings continued with regard to attorneys Robert E. Schneider and Hector Ricardo Ramos Diaz. During the conference, the Bar Association announced that it would bring extensive oral and documentary evidence. Attorneys Schneider and Ramos Diaz announced that they would bring no evidence at all.

On January 23, 1985, the parties signed a stipulation asking for the modification of the November 13, 1984 resolution and

covering some procedural aspects. The same was approved by the Court on the following day.

The evidentiary hearing was held on January 15 and 22, February 4, 5, and 6, and March 11, 13, and 25, 1985. During the same, the Bar Association brought abundant oral and documentary evidence. Said evidence was not controverted by the attorneys. Though at the prehearing conference the respondents had said that they would not bring evidence, in the course of the hearing Atty. Schneider asked permission to submit the record of the case before the Federal Court. The Special Master agreed to attorney Schneider's petition and the record was received in evidence.

On March 25, 1985, at the end of the hearing before the Special Master, the latter ordered the parties to submit a proposal on "findings of fact after the federal record is filed." Since as of April 30 attorneys Schneider and Ramos had not filed the record of the case before the Federal Court, the Special Master gave the parties 30 days to file a summary of the evidence brought in the case. The parties failed to file the summary of the evidence within the thirty (30) days and since the record of the case before the Federal Court was received on June 11, 1985, the Special Master, through an order of June 12, gave them 30 days more. The Bar Association sought and obtained an extension of time and on August 9 filed with the Special Master a draft Summary and Analysis of the Evidence, Findings of Fact, Conclusions of Law, and a Remedy. Attorneys Schneider and Ramos Diaz did not propose any remedy; but, through a motion of September 20, 1985, they just raised objections to the Bar Association's draft and counterproposed findings of fact and conclusions of law summarizing and analyzing the evidence vis-a-vis the Bar Association's proposals.

On November 13, 1985, the Special Master filed his report.

On March 18, 1986, we asked the parties to illustrate this Court as to how these proceedings would be affected by the United States Supreme Court decision in *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d

232 (1986). The Bar Association and attorneys Schneider and Ramos appeared setting forth their positions.

We shall provide the remedy in accord with the circumstances of fact and of law. First, however, we will complement, in the light of the evidence in the record of this case, the Federal Court's findings of fact as well as those contained in our case *Colegio de Abogados* v. *Schneider*, *supra*. We think this is necessary because the analysis of the Federal Court only extracted, from the evidence brought before it, those examples that, in its opinion, evinced ideological or politico-partisan activities. Said Court did not deem it convenient to describe the manifold character of the Bar Association, or of its other activities, or the proportion of resources devoted to them.[2] However, it would be tiresome to enumerate all the activities here. The evidence of such activities contained in the record, and summarized in the appendix attached hereto, is quite abundant, thus we will limit ourselves to drawing some conclusions which, in general, collect the evidence presented, including the activities summarized in the appendix and which complement the conclusions already drawn in the long pilgrimage of this case. Let us see.

II
Complementary Conclusions of Fact

The Bar Association has adequately complied with the obligations imposed by the law that created it. It has contributed to the improvement of the administration of justice, it has drawn reports; it has answered consultations sought by the Government; it has zealously defended the rights and immunities of attorneys seeing that they enjoy before the courts the

[2] On this particular the United States Court of Appeals for the First Circuit stated:

> "In the instant case, while the district court canvassed the range of the Colegio's ideological activities, it did not describe the Colegio's other pursuits or the proportion of resources devoted to them." *Romany* v. *Colegio de Abogados de P.R.*, 742 F.2d 32, 41 n.9 (1984).

freedom necessary for the good discharge of their professions; it has promoted brotherly relations among its members; and has looked after a healthy professional morale among bar members. It has also contributed to the enrichment of the intellectual life of attorneys and has strengthened a collective aspiration to a law-abiding democratic society.

The Bar Association is a democratic entity. Its President, its Board of Governors, and the directive bodies of the Delegations are elected in assemblies that guarantee to all bar members the participation, freedom of expression and right to present and to debate resolutions. The annual assembly approves the budget of the institution. The institutional life encourages open participation and tolerance.

The institution has fostered freedom of expression among its members and among citizens in general. Through the payment of a preestablished rent any person, natural or artificial, wishing to exercise the freedom of expression guaranteed by the applicable constitutional provisions, may use any of its physical facilities. By regulation, it releases from such payment certain institutions closely related to the functions entrusted to the Bar Association, which institutions are mainly constituted by attorneys or law students. Being a free forum for the legal profession and for the community, the Bar Association has promoted art exhibits, craft shows and, in short, has contributed to the improvement of the quality of life. The institution plays an important role in the vital development of the country.

The Bar Association has about thirty-five (35) standing or special committees. Among others, we can mention the following: Ethics; Legislation; Legal Education; For The Study of the Constitutional Development; Evaluation of Judicial Appointments; Evaluation of Prosecutors Appointments; Family Law; Criminal Law; Labor Law; Electoral Process; Insurance; Property and Notarial Law; Freedom of Expression, of Information and of the Press; Consumer Rights; Women Affairs; Bar Association Regulations; Public and Cul-

tural Activities; Sports; International Law and Relations with Professional Organizations having an International Character; Nuclear Arms Threat; Scholarships; Natural Resources and Environmental Quality; Computers and the Law; Relationship between Judges, Prosecutors, Registrars and Attorneys.

The evidence showed, beyond all doubt, that these committees play an effective and fruitful professional role for the institution and for the community. The Ethics, Legislation, and Legal Education Committees are made up of devoted and distinguished attorneys who have discharged their work in a very professional manner. The testimony of the President of the Bar Association and an examination of the documentary evidence show that, in general, the composition and discharge of the work by other committees have also been adequate.

The work performed by the Ethics Committee constitutes an effective effort to guarantee that all attorneys neatly comply with their professional obligations. The Legal Education Committee and the Institute of Practical Education, through which it operates, have contributed to improve the quality of legal education by making possible a master degree program at the Catholic University. It has a bar examination program in which a great number of professors of all the universities of Puerto Rico participate. It also holds seminars, forums, and similar activities. The Legislation Committee renders professional services to the Bar Association, to the Legislature and to the Government. Many times the Governor of Puerto Rico has sought the cooperation of the President of the Bar Association with regard to the appointment of judges and prosecutors. The Legislature systematically seeks the opinion of the Bar Association in matters affecting the administration of justice, civil rights, or the fundamental interests of the citizenry.

Furthermore, the Bar Association has collaborated with the Board of Bar Examiners and with the Supreme Court in matters dealing with the judicial conferences and the state of legal education. The Supreme Court has frequently consulted the Bar Association with regard to the approval of some regula-

tions bearing on the practice of the profession. Many government agencies consult the Bar Association as to law issues vital to social interest. That is, the Bar Association has been an effective collaborator with the different branches of the government and has been at the service of the bar members and of the community.

The publications of the Bar Association constitute another contribution to the strengthening of professional life. The institution offers a service through which it publishes and distributes among its members, free of additional cost, the opinions delivered by the Supreme Court. It also distributes a publication entitled "Notificaciones del Director Ejecutivo" (Notices of the Executive Director), which contains news of interest for attorneys. It collaborates with the Office of Court Administration in the publication and distribution of the review "Forum," which is distributed free of charge among judges and attorneys and which is aimed at improving the quality of the administration of justice and rising the level of the legal practice. The *Revista del Colegio de Abogados de Puerto Rico* (Bar Association Law Review) was founded on January 1, 1914. It has been a free forum where, naturally, the authors assume all responsibility for their writings. It has been thus specified since 1984. The law review has received collaborations of the most distinguished attorneys in Puerto Rico and circulates abroad. The Bar Association also publishes and distributes a Program for the Annual Assembly which contains, among other things, a certified financial statement and budget for the following year. Bar members receive all these publications free from additional costs. Besides those mentioned, the Bar Association sponsors the publication of many and diverse works, books, pamphlets, and reports that significantly contribute to the improvement of professional life.

The Bar Association renders many exceptional services to the community. It would suffice to mention the effective participation in the Legal Services Corporation, in the Legal Aid Society and in the Santurce Legal Office. Its Voluntary Legal

Service Program (Pro Bono) has the collaboration of more than 800 attorneys who devote their efforts to the defense of indigents. The extraordinary social contribution of the Pro Bono program to our country in 1984 made it worthy of the Harrison Tweed Award it received from the American Bar Association in 1984.

The Bar Association income comes from the bar members' dues (amounting to $100 yearly per member), the sale of bar and notarial stamps, the superavit of the notarial bonds, proceeds from review subscriptions, rent of premises, interests, the sale of books, and other miscellaneous revenue. During 1984, the institution had an income of $1,318,440 and expenses amounting to $1,361,105, which reflected a $42,665 deficit. The 1985 budget draft bill estimated an income of $1,247,800 and expenses of $1,288,785 for an estimated deficit of $40,985.

The institution has procured death insurance for each bar member amounting to $15,000, but which is reduced to $7,500 when the attorney dies after his 70th birthday. In case of accidental death, the compensation is $30,000 for attorneys under 70 years of age and $15,000 for those who are older.

The studies show that the cost of the insurance premium per bar member amounts to $73.76 and that the cost of the opinions distributed among bar members amounted to $22.45 per bar member during 1984.

The Bar Association carries a strict bookkeeping of its income and expenses. It has a competent and responsible internal and external auditing system. It has devised a system by virtue of which it is possible to determine the direct and indirect cost of any activity in such a way that anybody can accurately say what contribution would correspond per bar member to a specific activity.

Since the establishment of the procedure allowing bar members to object to activities that they could understand are ideological in nature, only 150 of the 6,704 bar members (2.24%) have exercised the option to ask that 50% of their dues be

deposited in an escrow account. It is significant that up till the hearings before the Special Master came to an end nobody had objected to any specific activity held by the institution since the date when the escrow account system was established as a temporary remedy.

To sum up, a study of the evidence shows the manifold character of the Bar Association activities and the intimate relationship of most of them with the legal profession and the ends and purposes of the Bar Association. However, as we have already seen in *Colegio de Abogados*, *supra*, *Schneider*, *supra*, and *Romany*, *supra*, the Bar Association has held other activities that have been challenged by some bar members. In *Schneider*, *supra*, the Federal Court enumerated the activities which, in its opinion, were ideological.

After carefully examining all the evidence presented before the Special Master, as well as all the evidence brought before the Federal Court, we conclude that the so-called ideological activities are only a minimum vis-a-vis all the work performed by the Bar Association.

III

In *Colegio de Abogados*, *supra*, we already examined the compelling state interests in this situation vis-a-vis the individual constitutional rights of freedom of speech and of assembly, not in their classic modality of barring them but in the mandatory character of assembling and identifying with the expression of the association.

Therein, we said on page 549:

> The public interest in the creation of a strongly pluralistic society, in furtherance of the practice of law and of the good operation of the judicial system, outweighs the personal inconveniences that compulsory membership might entail. The right not to assemble, which can be derived from the opposite right consecrated in the Constitution of

the Commonwealth, Art. II, Sec. 6, gives in before the above-mentioned interests, of such a clearly urgent nature under the Puerto Rico constitution.

[1] The erosion of the constitutional rights of the dissenting attorneys is small and tolerable and does not require a sacrifice of the compelling state interests or the enervation of the constitutional rights of the Bar Association in view of: (1) the balance already stricken between the conflicting interests in this matter: (2) the fact that, in the proceedings before the Special Master, the attorneys who appeared did not offer any evidence to the effect that the mandatory contents of compulsory bar membership went beyond a financial contribution; (3) that, as we have concluded, the so-called ideological activities constitute a minimum in view of all the work performed by the Bar Association; and, (4) that the statute furnishes the institution with a democratic structure.

[2] Notwithstanding the fact that the erosion is small and tolerable we also decided in *Colegio de Abogados*, *supra*, at 554-555, that "[o]n the other hand, lawyers who dissent from such pronouncements — and not those who object to the Bar Association's performance of its statutory purposes or of those imposed by this Court — enjoy, under the Constitution of Puerto Rico, the right to raise objection to the use of their contributions or of part thereof for ideological activities they do disapprove."

It is precisely to deal with that right to object that we have acknowledged to the dissenting attorneys that we must provide a remedy. Before doing so, however, we deem that we must briefly refer to two cases recently decided by the United States Supreme Court which, because of the date of the decision were not considered in *Colegio de Abogados*, *supra*. These cases provide additional general guidelines for devising the remedy.

[3] We will refer to those cases, as well as to other cases decided by the United States Supreme Court, for comparative

and orientation purposes because we have concluded, within the framework of this controversy, that "the sense of the freedom of speech clause contained in Art. II, Sec. 4 of the Constitution of Puerto Rico is not narrower than that given by the United States Supreme Court to the First Amendment in this context [unions with agency shop clause]." *Colegio de Abogados*, *supra*, at 554.

[4] In *Chicago Teachers Union*, *supra*, said Court reiterated that the purpose of the remedy is to devise a mechanism to prevent an institution from using the dues of those who object to subsidizing ideological activities, without unduly restricting the institution's ability to require members to contribute to the cost of complying with the purposes and ends required from the institution in behalf of the compelling interests pursued.

[5] Before that the United States Supreme Court, in *Ellis* v. *Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1889, 80 L.Ed.2d 428 (1984), rejected, for its inadequacy, the simple mechanism of refunding the dues to the dissenters because that resulted in a temporary benefit or an involuntary loan to the syndicate involved. It then proposed as alternatives advanced discounts in the dues or deposits in escrow accounts. It then went on to examine specific activities of the syndicate in order to determine their ideological character; for example, the assembly, the litigations, the publications, the social activities, etc.

Chicago Teachers Union, *supra*, at 244-245, complemented those pronouncements and elaborated, with greater strictness, on the procedural measures required by the interests in conflict. It grounded such requirements, within the context of the syndical relationship, as follows:

> Procedural safeguards are necessary to achieve this objective for two reasons. First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact

> that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee — the individual whose First Amendment rights are being affected — must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim. (Footnotes omitted.)

Chicago Teachers Union, 475 U.S., at 292, 106 S.Ct., at 1066, 89 L.Ed.2d, at 244-245.

[6] The main procedural measures ratified and elaborated in these cases may be summarized as follows: (1) potential objectors must receive adequate information to justify the dues imposed, when the dues reduction method has been chosen, or the proportion deposited, when the escrow account method has been chosen; (2) the adjudication process must be reasonably speedy and carried out before an impartial forum so that it may be fair and objective; (3) the dissenter only has the simple obligation to let others know of his objection because the same is not presumed; and (4) the Bar Association has the burden of proof to establish the proportion of dues used for the objected activity.

[7] In view of all the facts determined, of our decision in *Colegio de Abogados de P.R.* v. *Schneider*, *supra*, construing the rights of the parties in the light of the Constitution of the Commonwealth of Puerto Rico, and of the trend followed in *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961); *Romany* v. *Colegio de Abogados de P.R.*, *supra*; *Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Ellis* v. *Railway Clerks*, *supra*, and *Chicago Teachers Union*, *supra*, and in the exercise of our responsibility and inherent power, we devise the remedy for those who object to the use of

their contributions and of the Bar Association resources for activities foreign, not germane, to the ends and purposes of such institution. Although the activities which have led to these proceedings are those up to now called "ideological," we think it is more proper to refer to them collectively as "objectionable activities."

[8] The purpose of the remedy here structured is to provide to such bar members an instrument for effectively enforcing their rights and for preventing that their financial contributions be used to defray objectionable activities and to subsidize the same through the use of the facilities and resources of the Bar Association.

IV
The Remedy

A. *Definitions — "Objectionable Activities"*

[9] "Objectionable activities" shall be those that the Bar Association of Puerto Rico may legally hold in the exercise of its constitutional rights and within the historical, social, and political context that has given it life such as ideological activities, but with regard to which any member, in the exercise of his or her constitutional rights, may validly object to the use of his or her bar dues for either financially subsidizing such activities or providing them with the use of the Bar Association's facilities or resources. Activities comprised within the Bar Association's purposes and ends which are germane thereto shall not be considered objectionable activities. The functions and purposes of the Bar Association are:

> 1. To adopt, with the consent of the Supreme Court of Puerto Rico, the Canons of Professional Ethics which shall govern the conduct of lawyers.
>
> 2. To receive and investigate whatever complaints are brought with regard to the conduct of its members in the legal practice.

3. To institute disbarment proceedings before the Supreme Court of Puerto Rico.

4. To keep a sound and strict professional morale among lawyers.

5. To protect its members in the practice of the profession.

6. To create public assistance funds, insurance systems and special funds to aid its members or their heirs.

7. To advocate for the rights and immunities of lawyers.

8. To see to it that the lawyers enjoy enough freedom before the courts to enable them to duly discharge their duties.

9. To promote brotherly relations among its members.

10. To raise the educational, cultural, and ethical standards of lawyers in order to improve the quality of the legal services offered to the people.

11. To establish programs to serve the community and the legal profession, among them, legal and social aid programs for indigents for which purpose it will have the power to promote the creation of institutions that may aid the Bar Association to achieve its end, such as the Fundacion del Colegio de Abogados (the Bar Association Foundation).

12. To contribute to the betterment of the administration of justice.

13. To evaluate the reports and consultations claimed by the Government.

14. To create a real property title insurance corporation.

15. To exercise other powers conferred by law or by the Supreme Court of Puerto Rico and any other incidental powers necessary or convenient for the ends of its creation and which are not in disagreement with the purpose and the law which creates the Bar Association.

[10] The objectionable activities of third parties who use the Bar Association facilities shall not be subject to this remedy if the same are not paid with Bar Association funds or if they generate proceeds for the Bar Association to cover its costs and expenses. If such activity only generates income for the Bar Association partially covering the costs and expenses incurred by it, the difference or the balance thereof shall be understood to belong to the subsidy contributed to the same by the Bar Association and such balance will be subject to the remedy.

B. *Review Board of the Bar Association Activities*

[11] 1. The Review Board of the Bar Association Activities is hereby created as an autonomous body.

2. The Review Board shall be composed of three members appointed by the Supreme Court of Puerto Rico. The term of each member will expire two years after the appointment is made through resolution of this Court, without prejudice that it be extended for an additional consecutive term. As an exception to this rule, the first three members of the Review Board will be appointed for terms of one, two and three years respectively. The Court may, also, in the exercise of its powers appoint two substitute members in case any of its members cannot participate in any particular matter.

3. The members of the Review Board will be chosen among former justices of this Court or ex-judges from the Court of First Instance.

4. According to the needs and workload of said Review Board, and at its request, the number of its members may be increased by resolution of this Court.

5. The Review Board of the Bar Association Activities, following the procedural standards and guaranties laid down in the case law of this Court and in this remedy, shall examine the activities held by the Bar Association which have been objected to in order to determine whether the same are objectionable. It shall also compute the amount of dues to be refunded to the dissenting bar members whenever proper.

6. The Review Board shall approve a set of rules on the procedures before its consideration where it will provide, among other things: a speedy administrative hearing with due notice; a simple and fair proceeding; precise and reasonable terms; opportunity to the parties to present evidence in their behalf and to face adversary evidence; and that findings of fact and of law be made.

7. The regulations will be amended by decision of the Review Board or by decision of this Court. The Bar Association shall disseminate the regulations and the amendments thereto among all its members.

8. The Bar Association shall provide and make accessible to the Review Board the physical facilities and materials necessary for its adequate operation.

9. The Bar Association, through its communication channels, will keep its members up to date in a brief and simple manner, with regard to the investigations, the proceedings before the Review Board, and the latter's resolutions and orders.

C. *Procedure*

[12] 1. *Notice of the right to object*

a. Upon paying his annual dues to the Bar Association, or at any later date during the year, any bar member shall be entitled to notify in writing to the Executive Director of the Bar Association that he wishes to enforce his right to object in a generic manner to the activities of the Bar Association having an objectionable character. This right will be effective from the date of the notice and with regard to activities held after the same.

b. The notice will be made in writing to the Executive Director either personally or by mail and in any case with return receipt requested. It shall not be necessary for the bar member to point out any specific activity. Absence of due notice by the bar member shall be understood as an authoriza-

tion to the Bar Association to use the bar member's contributions in accordance with the institution's general budget.

c. As soon as the Executive Director receives the aforesaid notice, he shall take an amount equivalent to fifteen percent (15%) of the dissenting bar member's dues and deposit it in an escrow account, apart from other Bar Association accounts, which account will bear the name of each dissenting bar member. It being understood that if the generic objection to the activities is presented after the expiration of the payment of dues, the amount to be deposited in escrow will be computed on the balance of the annual dues resulting when the same is prorated throughout the annual term. The account will be adjusted to the interest rates and terms prevailing in the market. The Review Board shall have the duty and power to change, within what is reasonable, the proportion of the dues to be deposited in escrow according to the experience acquired.

d. Every bar member may object to any specific activity, without having previously notified a general objection, in which case, the remedy shall only benefit him as to said particular activity, if his claim prevails.

2. *Objections to objectionable activities*

a. An objection to a specific activity of the Bar Association for its alleged objectionable character, shall be made before the Review Board of the Bar Association Activities within the reasonable term provided in the Regulations.

b. Notice and adjudication of the objections to the activities of the Bar Association shall be governed by this remedy and by the Regulations.

3. *Adjudication of the objections filed by bar members*

a. The Review Board shall promptly adjudicate the objections filed by bar members according to the provisions of the Regulations. It shall notify its decision to the dissenting bar members and to the Bar Association.

b. The cost of every objectionable activity shall be determined by adding up all direct and indirect expenses incurred

by the Bar Association in the same. The proportional amount of the dues to be refunded to the dissenting bar member will be equivalent to the proportion between the cost of the objectionable activity and the total proceeds received by the Bar Association in the form of dues for the year when the activity is held. The Bar Association has the burden of proving the cost and proportion of the dues used in said activity.

c. The adjudication of an activity as having an objectionable character shall benefit all bar members who have presented a general objection and those members who have particularly objected to it subject to the provisions in paragraphs 1(a) and 1(d) above.

d. The dissenting bar member and the Bar Association may, within a period of thirty days from the notice, seek review from the Supreme Court of the final decision of the Review Board.

e. If the Review Board, or the Supreme Court on review, finally determines that certain activities of the Bar Association in a specific year are of an objectionable character, the Executive Director of the Bar Association shall make an annual liquidation of the escrow according to the decision and order or decisions and orders issued by the Review Board or by the Court, refunding the pertinent amount of money to each dissenting bar member.

f. The annual liquidation shall not be made if there is an objection pending decision for that year, unless the Review Board orders a partial liquidation, guaranteeing that said account will hold enough funds to satisfy any pending objection.

g. Once said annual liquidation of the escrow account is made, the Executive Director of the Bar Association shall remit the surplus, if any, to the Bar Association's general funds.

D. *Notarial and bar stamps*

1. The proceeds form the sale of notarial and bar stamps shall not be used for objectionable activities.

[13] 2. The proceeds from the sale of notarial and bar stamps shall be used to pay for bar members' insurance, legal aid to indigents, legal advice to the community, to receive and investigate complaints filed with regard to the conduct of bar members in the practice of the profession, the publication of the opinions of the courts, and for any other purpose comprised within the duties and purposes of the Bar Association.

E. *Other remedies*

All the principles and procedures established in this remedy shall apply to the activities pointed out by dissenting bar members and which, in the opinion of the Review Board, have an objectionable character. Attorneys Schneider and Ramos Diaz and all those who had stood under the temporary remedy decreed by this Court may make a list of activities which, according to them, were objectionable from the date when each one of them filed their complaints, and they shall notify such list to the Review Board for it to take the pertinent measures.

None of our statements herein shall be understood as barring this Court sua sponte, at the request of a party or of the Review Board, considering the experience, development and effectiveness of the permanent remedy drawn herein to protect the rights of the bar members who object to objectionable activities, from devising other remedies and taking the measures it may deem necessary. To this end, and for the purpose of supervising and regulating the legal profession and in the exercise of our inherent power we keep and retain jurisdiction over this matter.

Judgment will be rendered accordingly.

APPENDIX

SUMMARY OF THE EVIDENCE

This appendix summarizes the oral and documentary evidence on Bar Association activities received during the course of the proceedings before this Forum, before the Special Master, and before the United States District Court for the District of Puerto Rico in *Schneider* v. *Colegio de Abogados*, *supra*, and other cases consolidated with this one.

The Special Master received the testimony of attorneys Abrahan Diaz Gonzalez, President of the Bar Association, and Antonio Bennazar Vicens, Executive Director of the Bar Association, who testified extensively on the functions and operations of the Bar Association and its activities. Also received was the testimony of attorneys Manlio Arraiza Donate and Jose A. Virella Santana, regarding the work done by the Ethics Committee. Attorneys Salvador Acevedo Colón, and Georgina Candal de Segurola, testified on the activities of the Legal Education and Professional Improvement Committee and of the Legislation Committee they respectively chaired. Mr. Juan Espiet Gonzalez also testified as External Auditor of the institution with regard to the system and the accounting practices used by the Bar Association. The oral evidence was not controverted.

This appendix closes with the description of the exhibits presented and received.

I. *Institutional structure*

The General Assembly of bar members, which is held once a year and to which all bar members may attend, is the maximum authority of the structure of the Bar Association, 4 L.P.R.A. §§ 776-777; Article 24 of the Regulations of the Bar Association; Tr. Ev., p. 15. The Assembly has the exclusive power to promulgate and amend the Regulations of the Bar

Association and to approve the budget submitted by the Board of Governors every year. Tr. Ev., p. 15.

Every two years, in the General Assembly, the bar members choose the President of the Bar Association through direct vote. In said assembly they may vote for two delegates-at-large. Four of the delegates to the Board of Governors are elected this way. 4 L.P.R.A. § 777; Tr. Ev., pp. 63-65. The Assembly also considers the resolutions submitted through the Executive Director. Tr. Ev., p. 16.

Besides his administrative functions, the President acts as speaker of the determinations, resolutions, and agreements taken by the Board of Governors of the Bar Association. Art. 37, Regulations of the Bar Association. *(Schneider*, Exhibit 4, p. 78.) As such, he is responsible for publicly disseminating its contents.

In the local sphere, the President often holds press conferences to communicate to the Puerto Rican community the agreements reached by the institution on different matters. *(Schneider*, Tr. Ev., pp. 9-11, 78, 99-102, 124-125; Exhibits 40, 96 to 107; see also Exhibits 148 and 154.) To such ends, he also appears in radio and television programs. He is special guest in acts and commemorations related to the administration of justice and to the practice of law.[3] He uses the government's official communication channels to inform the people of the position of the Bar Association and its committees on different controversies. Thus, in compliance with law — 4 L.P.R.A. § 772 — he resorts to the executive and legislative forums to contribute, criticize or advise as to possible solutions or controversies generally regarding pending legislation and

[3] Speech delivered in the swearing in of Judge Jaime Pieras in the United States District Court for the District of Puerto Rico *(Schneider*, Exh. 108); speech delivered in the swearing in of the Chief Clerk of the Supreme Court of Puerto Rico, attorney Lady Alfonso de Cumpiano, 111 D.P.R. XIII, XV-XVII (1980); Memorial Session in honor of the Honorable Armindo Cadilla Ginorio, Associate Justice of the Supreme Court, 103 D.P.R. IX, XIV (1975); Farewell ceremony of the Hon. Mariano H. Ramírez Bages, 101 D.P.R. XX (1973).

the appointment of public officers connected to the administration of justice. Tr. Ev., pp. 145-149; art. 33, Regulations of the Bar Association; *(Schneider*, Tr. Ev., pp. 79-81, 118-119, 146, 152; Exhibit 15).

He has gone to the United States Congress where he has appeared before several of its committees on different occasions. *(Schneider*, Tr. Ev., p. 78.) He has appeared before the United Nations Organization and some of its bureaus or committees, for example, the Decolonization Committee of the United Nations. These appearances have obeyed the mandate of the organisms that direct the destiny of the Bar Association: its General Assembly and its Board of Governors. 4 L.P.R.A. § 776. Tr. Ev., pp. 278-280, 419-421; Exhibit 36; *(Schneider*, Tr. Ev., pp. 82, 122-123). See: *Informe del Colegio de Abogados de Puerto Rico al Comite de Descolonizacion de las Naciones Unidas*, 35 Rev. C. Abo. P.R. 329-356 (1974); *Ponencia del Colegio de Abogados de Puerto Rico ante el Comite de Descolonizacion de las Naciones Unidas*, 39 Rev. C. Abo. P.R. 157-176 (1978). *(Schneider*, Exhibits 6a, p. 21; 6f, p. 23; 237-239). He has also appeared before the Permanent Latin American Missions to the United Nations, etc.

The Bar Association has been represented by its President or by special delegations before other forums or institutional bodies of the United States or other countries, whenever it has been the seat of encounters and exchanges with attorneys of other countries. Pennsylvania Bar Association *(Schneider*, Exhibit 6c, p. 20); Virgin Islands Attorneys Delegation *(Schneider*, Exhibit 6c, p. 46); Interamerican Federation of Attorneys *(Schneider*, Exhibit 6d, p. 24); American Bar Association *(Schneider*, Exhibit 6d, p. 26). See art. 35 of the Regulations of the Bar Association.

The President of the Bar Association is also a member of the directive bodies of other institutions which represent, aid, and give legal advice to indigents in Puerto Rico, among which we have, for instance, the Legal Services Corporation of Puerto Rico and the Puerto Rico Civil Rights Institute. *(Schneider*, Tr. Ev., p. 104; Exhibit 235, pp. 213-215.)

The Board of Governors is the Bar Association's governing body but it operates under the authority of the General Assembly. 4 L.P.R.A. § 776; art. 33, Regulations of the Bar Association. It is composed of the President of the Bar Association, the outgoing President, who has no right to vote, and thirty (30) delegates. 4 L.P.R.A. § 777. The twenty-six (26) delegates who are not elected by the General Assembly are chosen by the thirteen (13) regional delegations into which Puerto Rico is divided. 4 L.P.R.A. § 777; Tr. Ev., pp. 16-17. The Board of Governors elects the Board of Directors which has decision-making power during the term the Board of Governors is not constituted, Tr. Ev., p. 17. In its meetings, usually held once a month, the Board of Governors analyzes, studies, and participates in different institutional matters or matters of general interest brought before its attention. In these meetings all the bar members have a right to speak but not to vote. *(Schneider*, Tr. Ev., p. 177.) There are times when the Board of Governors states formally its position and recommendations as to certain controversies through agreements and resolutions. These are quite varied in character and include: internal administrative proceedings; the approval of studies conducted by different committees of the Bar Association; the commission of matters for study; recognitions to distinguished attorneys and Bar Association officers; the approval of legal services for indigents; continued legal education; legal, cultural, and social exchanges with attorneys from other jurisdictions; benefit programs for bar members; social activities; pronouncements and statements on local and foreign matters of general interest. Exhibits 46-48 (1978-1984). (For a brief summary of the agreements and resolutions of the Board of Governors from 1976 to 1982, see, *Schneider*, Exhibits 6a, pp. 17, 23; 6b, pp. 17, 23; 6c, pp. 17, 21; 6d, pp. 21, 25; 6e, pp. 19, 21; 6f, pp. 20, 22. See also Exhibits 235, 35-50.) The Bar Association's administrative operation is in charge of an Executive Director who complies with the agreements of the Board of Governors and keep the same informed of the Bar Association's opera-

tions. Tr. Ev., pp. 13-14. The Executive Director is chosen by the Board of Governors by recommendation of the President. Tr. Ev., p. 18.

Since the present President of the Bar Association, attorney Abrahan Diaz Gonzalez, took office, the Board of Governors has focused its efforts primarily on two areas. In the first place, the Board has tried to solve the problem of legal education in Puerto Rico. Through a resolution to that effect, the Board asked the Supreme Court to appoint a committee to update a study it had prepared on the bar examination. It has also made recommendations on the state of the law schools of Puerto Rico. Tr. Ev., pp. 368-369.

In the second place, the Board of Governors has taken a great deal of time to plan a legislative program which seeks the Legislature's approval of four bills dealing with the operation of the Bar Association. These bills would make a significant contribution to raising the quality of the legal profession. The first bill seeks to grant the Board of Governors of the Bar Association the power to fix, within certain parameters, the date for the General Assemblies of the institution and the election of the members of the Board and the Board of Directors of the Delegations. The second seeks to vest the Ethics Committee with the powers of inquiry had by the Legislative Committee, when dealing with the professional conduct of attorneys. The third bill seeks to increase the bond posted by notaries to secure strict compliance with their obligations from $2,500 to not less than $20,000. The fourth bill seeks to create an independent foundation to be funded with the proceeds from an increase in the price of bar and notarial stamps. The new foundation shall provide the physical and personnel resources needed by the institution to systematically review all the codes, all the bodies of law, and to make all the necessary humanistic studies with its own research staff. The current foundation of the Bar Association would be in charge of the funding, due to its tax exemptions and flexibility. Tr. Ev., pp. 369-386; Exhibit 51.

II. *Committees*

A great deal of the Bar Association's activities are held through its committees. At the time the hearings were being held before the Special Master, there were about 35 committees. A list of some of the committees with their respective chairmen was filed. Exhibit 15. Some of the committees are permanent and some are temporary. Tr. Ev., p. 278. We will describe below the activities held by some of the committees.

A. *Ethics Committee*

The Organic Act of the Bar Association, Act No. 43 of May 14, 1932, entrusts the Bar Association with two basic functions regarding professional conduct. In the first place, the Bar Association is empowered to adopt and establish, with the approval of the Supreme Court, the Canons of Ethics that shall govern the conduct of lawyers. 4 L.P.R.A. § 773(f); Tr. Ev., p. 215. In the second place, the Bar Association has the power to receive and investigate complaints on the conduct of attorneys admitted to the practice of the profession in Puerto Rico, which complaints may be referred to the Board of Directors so that, after a hearing where the respondent shall have the opportunity to be heard, if probable cause is found, the corresponding disbarment proceeding will be filed with the Supreme Court. 4 L.P.R.A. § 773(g); Tr. Ev., pp. 215-216.

Pursuant to the legislative mandate, art. 45 of the Regulations of the Bar Association has invested the Ethics Committee with the following duties regarding the conduct of attorneys:

> A — To investigate the professional conduct of bar members either on its own initiative, or at the request of the Board of Governors; and to submit the corresponding report with specific recommendations.
>
> B — To issue an opinion on its own initiative or at the request of any member of the Bar Association, on a person's

professional or judicial conduct, provided that the opinion does not deal with matters concerning judicial decisions or with the exercise of discretion by the courts. Tr. Ev., pp. 216-217.

Attorney Manlio Arraiza Donate, member of the Ethics Committee, testified before the Special Master on the complaint proceedings followed before said committee. Tr. Ev., pp. 215-241.

Any citizen having a complaint against an attorney may resort to the Bar Association and file a writing to that effect. Once the complaint is filed, it goes before the consideration of one of the Committee members. If it appears from the writing that there is a violation of the Canons of Ethics, or if from the writing it is inferred that there is ground to believe that there was a violation, the bar member is notified with a copy of the Regulations — Exhibit 37 — so that he may answer the complaint within the regulatory period. The bar member's answer is sent to the complainant so that the latter may make whatever comments he deems necessary. After receiving the respondent's answer, the Ethics Committee determines if the complaint should be dismissed or if, on the contrary, the complaint warrants the holding of a hearing. At the hearing, both parties are given ample opportunity to be represented. The Regulations even provide that if the complainant wishes to have legal representation, the Bar Association is committed to give it to him. Then the Committee makes its final decision which could be that there was no violation of the Canons of Ethics in which case the complaint is dismissed. If, on the contrary, it is found that the respondent has violated the Canons of Ethics, a report should be prepared and submitted to the Board of Governors. Before the report is submitted to the Board of Governors, both parties are notified of the same and it is approved by the full Committee. Both parties are notified of the date when the report is going to be submitted to the Board of Governors. The parties may appear on that date to defend their position. If the

Board of Governors adopts the report, the complaint is formally forwarded to the Supreme Court where the proceeding on professional conduct begins. Tr. Ev., pp. 217-220; Report of the Special Master, pp. 51-52.

The Ethics Committee is constituted by twelve members. Tr. Ev., p. 226. They are appointed by the President of the Bar Association with the unanimous advice and consent of the Board of Governors. Tr. Ev., p. 227. Although the members of the other committees of the Bar Association are also appointed by the President, the appointment of the members of the Ethics Committee requires the consent of the Board of Governors due to the delicate nature of their functions and duties. Tr. Ev., p. 227.

The Committee has a person hired under a part-time contract by the Bar Association with the exclusive function of conducting investigations, and a secretary who handles administrative procedures. Tr. Ev., pp. 361-367. Save for a two or three week recess in Christmas and the Annual Assembly week, the Committee meets every Tuesday. Sometimes it has held more meetings. Every year the Committee receives from 300 to 400 complaints from which 15 to 35 are referred to the Supreme Court. Tr. Ev., pp. 222-225.

Every year the Committee renders a report summarizing the work performed. Exhibit 37.

The July 6, 1983 report shows that the Committee has made a series of consultations on ethico-legal themes, as for example: whether or not to approve public advertising, the collection of fees for case referral, professional secret vis-a-vis section 7203 of the Federal Internal Revenue Code, and the conflict of interests in the representation of voluntary legal services. Exhibit 37; Tr. Ev., pp. 235, 237-283.

The Committee also has an orientation program for lawyers. If a lawyer has any concern with regard to a professional liability problem, he may bring it before the Bar Association. This consultation service is absolutely free for bar members. Tr. Ev., p. 471. Furthermore, the Bar Association is planning

to offer to the bar members lectures on the Canons of Professional Ethics at each of the district delegations on the island. Tr. Ev., p. 240.

B. *Legal Education and Professional Improvement Committee*

The Legal Education and Professional Improvement Committee was created to keep bar members up to date in their knowledge of the law. Tr. Ev., p. 169. Said Committee is composed of judges, law school professors and lawyers known for their excellent academic background and professional experience. Tr. Ev., pp. 168-169. At the time the hearings were held before the Special Master, the Committee was chaired by attorney Salvador Acevedo Colon. Tr. Ev., p. 168. The Committee sponsors the Institute of Practical Education, a nonprofit corporation organized in 1979 and engaged in the improvement of the legal profession. Tr. Ev., pp. 244 and 248. It has its own accounting system and an external auditor. Tr. Ev., p. 248. The members of the Legal Education and Professional Improvement Committee are the directors of the Institute. Tr. Ev., p. 172. The President of the former is also the President of the latter. Tr. Ev., p. 168. The Institute was created to give more flexibility to the achievement of the Committee's objectives. Tr. Ev., pp. 243-245.

The Committee, through the Institute, offers bar members a series of seminars, talks and lectures on the different areas of the law. Tr. Ev., p. 170. In some cases a nominal figure is charged and in other cases they are offered free of charge. Tr. Ev., pp. 24, 170-171, 188.

Among the educational activities held are:

1. Seminars for new lawyers.
2. Seminars on Damages.
3. Problems of the Law of Evidence.
4. Workshop on Estate Planning in Puerto Rico.

5. Seminar on Injunction.
6. International Seminar on the Right to Work.
7. Appellate Procedures seminar.
8. Seminars on Civil Procedure.
9. Seminars on Law Office Management.
10. Seminar on Municipal Law in coordination with the Municipal Services Administration.
11. Seminar on Social Security.
12. Seminars on Registry Law.
13. Seminar on Preliminary Hearing Procedure.
14. Seminar on the Organic Act of the Department of Consumer Affairs (DACO).
15. Seminar on the Workmen's Accident Compensation Act.
16. International Meeting of Jurists. With the participation of Professors Andres Tunk of the Center of Compared Judicial Studies of the University of Paris, Arthur Mergen, law professor at Harvard University, and Ferdinand Stund, professor at Tulane University.
17. Seminar on Appellate Procedure before the Supreme Court of Puerto Rico.
18. Seminar on the Due on Sale Clause.
19. Seminar on Tax Law.
20. Seminar on Stress Management, offered by a panel of physicians.
21. Seminar on Estate Planning and the Puerto Rico Estate Law.
22. Seminar on Personal Property.
23. Seminars on Bankruptcy.
24. Seminar on the liability of physicians who work for hospitals.
25. Seminar on Medical Malpractice.

Tr. Ev., pp. 186-202, Special Master's Report, pp. 46-48.

The Committee and the Institute also offer, twice a year, review courses for the bar examination opened to bar examination applicants. The proceeds from such courses allow the Institute to be completely self-sufficient to the point that it has even made a loan to the Bar Association. Tr. Ev., pp. 252, 255, and 257.

The Institute is organizing a review course that will cover the different areas tested by the federal bar examination to help those bar members who wish to practice law before the United States District Court for the District of Puerto Rico. Tr. Ev., pp. 175-176.

C. *Committee for the Study of the Constitutional Development*

The Committee for the Study of the Constitutional Development is constituted by attorneys from all political stands. Tr. Ev., pp. 278, 420. Among the studies it has conducted, the most important are: police corruption as a threat to the democratic system, the electorate's direct means of intervention in the political process. And the third one is the result of a series of reports on the Puerto Rican status issue. One of the reports, which was unanimously approved by the members of the Committee, recommends some minimum requirements that should be guaranteed under any status alternative. Based on these reports, the President of the Bar Association has appeared before the United Nations to present the recommendations of the Committee. Tr. Ev., pp. 278-280, 419-421; Exhibit 36.

D. *Legislation Committee*

As it can be inferred from art. 45, item 2, of the Regulations of the Bar Association, the Legislation Committee has the following functions:

(a) To be alert to all legislation proposed and which could affect or which affects the administration of justice, the practice of the legal profession, or the existence and operation of the Bar Association.

(b) To draft written reports, setting forth the grounds for recommending to the Board of Governors of the Bar Association those legislative measures it deems pertinent, preparing whatever draft bills are necessary.

(c) To cooperate with the Legislative Assembly whenever such cooperation is requested from the Bar Association. Exhibit 1; Tr. Ev., p. 137.

Besides the regulatory functions, the Committee furnishes information on pending legislation to citizens or organizations that request it. Tr. Ev., p. 138; Exhibit 39.

The Committee is composed of bar members appointed by the President of the Bar Association. Tr. Ev., p. 153. It reviews draft bills brought before the Legislature and selects those that could be of interest to the Bar Association and to the practice of the legal profession. Tr. Ev., pp. 143-145.

The Committee does not lobby for draft bills on behalf of any group or individual. The criterion used by the Legislation Committee to analyze and adopt a position with regard to a legislative piece is based on a purely legal analysis. The Committee analyzes the case law and the current laws and recommends changes. Tr. Ev., pp. 146-148.

Between November 1982 and January 1985 the Legislation Committee studied and commented from 80 to 90 legislative pieces. From these, approximately half were commented at the request of the Legislative Assembly and the other half was studied at the initiative of the Committee based on the priorities and matters of interest of the Bar Association. Tr. Ev., pp. 151, 163-164.

E. *Other Committees*

The Special Master also received reports on the work performed by other committees. See Section VI, *infra*. From among these committees we may point out the following: Evaluation of Judicial Appointments; Family Law; Criminal Law; Labor Law; Electoral Process; Public and Cultural Activities; Defense and Development of Women's Rights; Human Rights and Constitutional Rights; Committee for the Study of the Working Conditions of Attorneys in the Public Service.

III. *Legal aid to indigents*

The Bar Association was the main framer of the Voluntary Services Corporation (Pro Bono). The opportunity cropped up when the Legal Services Corporation in Washington decided to allocate a certain amount of funds to lawyer associations willing to participate directly in the aid to indigents. The main objective of the Pro Bono program is to provide free legal services to low income individuals. The program offers services in civil and juvenile cases. It also gives aid to the Carolina Center for the Elderly and to the Youth Office assigned to the Governor's Office. These two entities make financial contributions to the Pro Bono program.

The Pro Bono Program operates partially with federal funds and with the participation of voluntary attorneys of the Bar Association. Besides the original contribution made, the Bar Association makes a yearly contribution amounting to $40,000 as rent for the premises. Pro Bono uses the premises of the Bar Association and its printing services. Its Board of Directors is composed of the Executive Director of the Bar Association, two directors appointed by the President of the Bar Association, the President of the Legal Aid Committee of the Bar Association, two attorneys appointed by the Executive Director of the Legal Services Corporation and three persons elected by an assembly of clients.

More than 800 attorneys of the Bar Association participate in the Pro Bono program and since the program began it has dealt with 1,815 cases in 1982; 3,688 cases in 1983; and 5,902 cases in 1984. In recognition of its extraordinary work, the American Bar Association awarded it the "Harrison Tweed Award" in 1984. Tr. Ev., pp. 20-22; Special Master's Report, pp. 33-34. See Exhibit 3.

IV. *Publications*

The Bar Association publishes or sponsors several publications: a law review; a monthly newsletter of the activities of the Bar Association and its instrumentalities; reports of the different committees; and works and other writings of attorneys-authors.

The *Revista del Colegio de Abogados* (the Bar Association Law Review) publishes a myriad of articles on all the areas of the law. It has published articles described as "political or ideological rhetoric" that bear little relation to the works of a law review. *Schneider, supra*, at 969-970.[4] The Law Review sometimes publishes some of the resolutions and proceedings before the Board of Governors and the General Assembly, some of which have been labeled as ideological. *Schneider*, at 969 n.16.

Without going into the propriety of those pronouncements within the context of the remedy we will devise below, we note that the articles mentioned only represent 4, 4, and 15 percent of the total pages printed for volumes 39, 42, and 43 of the Bar Association's Law Review respectively, that is, about 7 percent of the total amount of pages published in those volumes. Said percentage necessarily decreases if we consider

[4] It referred to the following articles: Mari Bras, *La Jornada de 1978 en Naciones Unidas*, 42 Rev. C. Abo. P.R. 555-573 (1981); Aponte Vazquez, *Necator americanus: O Sobre la fisiologia del caso Rhoads*, 43 Rev. C. Abo. P.R. 117-142 (1982); Marcksoud Lopez and Serrano Garcia, *El mito de la democracia: Apuntes sobre la cultura politica puertorriquena*, 43 Rev. C. Abo. P.R. 359-401 (1982).

those volumes whose articles, as a whole, have a legal, "non-ideological" character. (See Exhibit 18; *Schneider*, Exhibits 243, 244.) Even though it was not a practice to do so, since January 1984 the Bar Association's Law Review has expressly notified the readers that it is not liable for the contents of the articles published.

The Bar Association offers an advance sheet service of the opinions of the Supreme Court of Puerto Rico. As the Court issues its opinions, the Bar Association reproduces them with a summary of the facts and syllabus. Tr. Ev., p. 29; Exhibit 24. The Bar Association mails those opinions to all the attorneys who so wish without charge. Tr. Ev., p. 30. Non-bar members who wish to subscribe to the service are charged $35 per year. Tr. Ev., p. 57.

The Bar Association sends to all bar members the Notices of the Executive Director. These notices include: (1) administrative court orders; (2) changes in the rules of the courts; (3) the resolutions approved by the Board of Governors and by the Assembly; (4) the courses and seminars offered by the Legal Education Committee and by the Institute of Practical Education; (5) the seminars on law, lectures, congresses, courses, and conventions outside Puerto Rico; (6) the state of legislation presented before the Legislature and the acts approved by the Governor bearing on the profession; and (7) the regulations recently promulgated by the different government agencies. The service of notices also includes information on employment opportunities, sale of books and offices, and information on the activities of the committees. Tr. Ev., pp. 30-32; See Exhibit 19. All bar members have access to this service.

The Bar Association collaborates with the Office of Court Administration in the publication of a new law review entitled *Forum*. Tr. Ev., pp. 33-34. This new review substitutes the old "Factum." Tr. Ev., p. 282; Exhibits 20.

The program of the Annual Assembly of bar members is another vehicle of written communication with the members. According to the Regulations the program must be published

and a copy of the same sent to all bar members notifying them of the results of the election of delegates of the District Assemblies. Art. 14, Regulations of the Bar Association. An analysis of all the programs shows that they offer valuable information to the bar members with regard to the administration and operation of the institution: financial statements, income and expenses, budget, etc. It also has a summary of the resolutions and agreements adopted by the Board of Governors during the previous year. Furthermore, it presents a brief exposition of the social, educational, and miscellaneous activities held by the Bar Association, its governing bodies and its committees assuming the activities held by the institution during the previous year. (*Schneider*, Exhibits 6a-6f.) Usually, the Annual Assembly is dedicated to a subject of interest or to a distinguished person. Exhibits 42-45. The subject or person to which or to whom the assembly is going to be dedicated is chosen by the Board of Governors of the Bar Association. Tr. Ev., pp. 393-396. In *Schneider*, *supra*, some of the covers of these programs as well as the messages of the President were labeled as ideological. *Schneider*, *supra*, at 970.

Occasionally, the Bar Association with the approval of the Board of Governors publishes the reports of its committees. (*Schneider*, Exhibits 245; 252; 253; 244, pp. 619-34; 22-24. See also Exhibits 234 and 236.) It also publishes or cosponsors the publication of works by authors who are attorneys and who make a contribution to Puerto Rican law. See Exhibit 23; (*Schneider*, Exhibit 8).

V. *Physical facilities*

In its Miramar seat, the Bar Association has its administrative offices, the office of the President, the printing office, the offices of the Ethics Committee and the Legal Education Committee, and a restaurant-bar. It also has an activities hall that seats 450 persons, the Board of Governors hall, that seats 75 persons, and the reading room. Tr. Ev., pp. 34, 41. These

last three premises, together with the lobby of the Bar Association building, are available for the use of private entities or individuals who pay a rent and comply with the rules for the rent of the Bar Association premises. Tr. Ev., p. 34; Exhibit 21.

These premises are also used by lawyers for their family and professional activities for a rent equivalent to half of what is paid by nonmembers. There is a list of organizations that have been exempted from the payment of rent by the Board of Governors, save for a minimum charge for maintenance, to wit: the Legal Services Corporation, the Legal Aid Society, the Property Registrars Association, the Catholic Attorneys Association, the Evangelist Attorneys Association, the Association of Wives of Attorneys, the Institute of Practical Education, the Bar Association Foundation, the Egida del Colegio de Abogados (Home for Retired Lawyers), the Council of Presidents, the National Association of Law Students, the Association of Attorneys Practicing before the Industrial Commission, the Notarial and Registry Law Institute, the Association of Prosecuting Attorneys, the Association of Friends and Relatives of Inmates, the Federal Bar Association, the Judicial Association, the Puerto Rico Bankruptcy Bar Association, the Comparative Law Study Center, the Luis Munoz Morales Chapter of the Law Fraternity Phi Alpha Delta, the Civil Rights Institute, the Association of Women in the Judiciary, the Association of Inter-American Alumni, the Puerto Rican Law Foundation, the Committees of the Bar Association, and the Bar Association District Delegations. Bar Association personnel is also exempted from paying rent. Tr. Ev., pp. 35-38; Exhibit 21.

The premises may be used by any person who requests it subject to the rules of order established and to the payment of the corresponding rent. Tr. Ev., pp. 38-39, 509. According to the uncontroverted testimony of the President of the Bar Association, the rent of the premises is not subject to any type of discrimination by reason of the contents of the message or the affiliation of the lessee. Tr. Ev., p. 511.

Many meetings, public hearings, and social activities of all kinds have been held in said facilities. Different groups hold their press conferences in the physical facilities of the Bar Association: labor unions, political parties, political groups, students, art organizations, social organizations, civic organizations, religious organizations, dissenting and protest groups, etc. *(Schneider*, Tr. Ev., p. 153.) Others hold their periodical or organizational meetings. These facilities are also used to hold arbitration hearings and public hearings. The social and art activities held at the Bar Association are many and varied, as for example, parties of the bar members or their relatives, concerts, plays, movie shows, graduations, balls, banquets, beauty or fashion contests, etc. Exhibit 22; *(Schneider*, Exhibits 247, 248-249; 1, pp. 1-11.)

VI. Description of the exhibits filed before the Special Master

1. Current Regulations of the Bar Association of Puerto Rico. *(Schneider*, Exhibit 4.)

2. A photocopy of the Certificate of Incorporation of the Fundación Colegio de Abogados de Puerto Rico, and the cover letter.

3. Report of attorney María Inés Cartagena Colon, Executive Director of Pro Bono, Inc., Puerto Rico Bar Association Voluntary [Legal] Services, dated January 10, 1985.

4. Articles of Incorporation of Puerto Rico Bar Association Voluntary Legal Services, also known as Pro Bono, Inc.

5. Regulations of the Bar Association Voluntary Legal Services.

6. List and amount of cases, according to subject matter, handled by Pro Bono from June 1981 to June 1982.

7. July 12, 1984 letters of the Chairman of the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association, and of Benjamin Lerner, President of the National Legal Aid and Defendants Association, addressed to Arturo Negron Garcia, Esq., President of the Bar Association.

8. A photocopy of Cornerstone, the newsletter of the National Legal Aid and Defender Association, Vol. 6, No. 4, regarding the Harrison Tweed Awards. A publication which acknowledges the award given to the Bar Association.

9. Communications presented before the Award Committee regarding the proposal for the award, and describing the merits of the proposal and the activities.

10. Bar Association press release of May 19, 1984, on the award, including a photocopy of an article entitled *The Bar Association Services the Poor* published in *El Reportero* newspaper.

11. List of attorneys who have shown an interest in voluntary legal services training.

12. Abstracts published by the Bar Association's Voluntary Legal Services, indicating the services offered, how to choose the services, the eligibility criteria, the clients' duties, and other related matters.

13. Programs and invitations for the seminars offered by Voluntary Legal Services, with a list of the same, advertisements, and other documents related to the seminars and the short courses offered.

14. Documents related to the Bar Association Institute of Practical Education with a list of the activities held by the Attorney's Legal Education and Improvement Committee from 1979 thru 1984. The invitations to the seminars and courses are attached thereto.

15. List of current Bar Association committees and their chairpersons.

16. A copy of the 1985 Bar Association budget, approved by the General Assembly held on September 4, 1984.

17. A copy of Resolution No. 1, approved by the Bar Association Assembly on September 3, 1983.

18. Summary of the table of contents of the Bar Association Law Review from 1974 to 1983.

19. Notices sent by the Executive Director to bar members from 1983 to 1984.

20. *Factum* and *La Toga* newsletters up to December 1984. Labor Law newsletters published by the Bar Association from 1981 to 1984.

21. Documents regarding the rules to rent the Bar Association premises.

22. A list of the use of facilities, which includes all the activities held by the Bar Association from 1982 to 1984.

23. Copies of the following publications by the Bar Association:

a. Regulations for executing the 1979 Mortgage and Property Registry Act, published in 1980.

b. Bar Association Legislation Services, Mortgage and Property Registry Act, Act No. 198 of August 8, 1979.

c. *Los Abogados de Puerto Rico, Fundamento para una sociologia de la profesion legal* (The Attorneys of Puerto Rico, Grounds for the Sociology of the Legal Profession), by Jaime B. Fuster, Esq., 1984 edition. *(Schneider*, Exhibit 8.)

d. *Penal Code Commented*, 1975 edition.

e. *Procedimientos Apelativos Civiles* (Civil Appellate Procedures), by Alvaro Calderon, Jr., Esq., and David Rive Rivera, Esq., published in February 1978.

f. *Instructions to the Jury for the Superior Court of Puerto Rico*, 2d ed. 1979.

g. *Los dérechos del acusado* (The Rights of the Defendant), by Ismael Betancourt y Lebron, Esq., 1975.

h. *Toga Lirica*, by Alma Delgado de Torres, Esq.

i. *La filiacion en Puerto Rico* (Filiation in Puerto Rico), by Alvaro Calderon, Jr., Esq. 1978.

j. General Index of the Puerto Rico Bar Association Legislation and Case Law Review, by Vilma Rivera de Bayron, of the University of Puerto Rico Law Library.

k. Brochures regarding the Community Legal Education Committee.

l. Rules of Civil Procedure of 1979.

m. Rules of Evidence of 1979.

n. 1959 report to the Hon. Governor of the Commonwealth of Puerto Rico, by the Committee for the Study of Civil Rights.

o. Prontuario de Etica (Handbook of Ethics), by Eliadis Orsini Zayas, Esq., 1983.

p. Handbook containing the Code of Ethics that will govern the professional conduct of attorneys in Puerto Rico.

q. Supreme Court Case Law Index from May 1981 to May 1982.

r. List of the commercial entities servicing the Bar Association, with the global discounts.

s. *America Through its Women Judges*, September 1981.

t. *The Rights of the Mentally Retarded*, September 1978.

u. *Glossary of Legal Terms for Journalists*, 1984.

v. *Historical Handbook of the Grito de Lares*, etc.

w. *Notarial Law*, revised edition, May 1981.

x. Speech delivered by the Hon. Jose Trias Monge in the 1975 Assembly of the Bar Association.

y. *Woman, Know Your Rights*, by the Committee for the Improvement of Women's Rights, June 1978.

z. *Rules of Administration for the Court of First Instance*, 1975.

aa. Speech delivered by Marcos A. Ramirez, Esq., to the Ponce 1972 Assembly.

24. Opinions of the Supreme Court of Puerto Rico circulated among bar members from 1983 to 1984.

25. Report of the Bar Association Family Law Committee on the work of the last few years. This Exhibit contains a summary of the Committee's work from 1980 thru 1984, among others: the project of community orientation entitled: *The Law Within Your Reach*, which is an effort to explain to the

citizenry, in simple terms, what are their rights and obligations under the family laws, so that citizens may, among other things, fend for themselves before the Courts. It also contains an offprint of the article published in *El Vocero* newspaper — daily issue of 206,800 copies — on September 5 and 10, 1983. The Committee conducted studies on the draft bills dealing with the rights of the children in Puerto Rico and on other Family Law legislation.

The Committee also organized a series of lectures on Family Law dealing with the condition of women, custody, and patria potestas.

26. A summary of the activities of the Public and Cultural Activities Committee. This exhibit contains a summary of the activities of the Committee from 1979 to 1984, to wit: forums, lectures, art shows, and social activities related to the profession, among others: lectures by distinguished professors of Georgetown University, collaborations with the Labor Law Committee, seminars on Lobbying, Natural Resources, Civil Rights, Unemployment, History, Women's Problems, and other cultural and professional activities.

27. A summary of the activities of the Committee for the Defense and Development of Women's Rights held between 1981 and 1984. This exhibit gives a detailed relation of the myriad meetings, forums, lectures, and seminars dealing with the problems affecting Women's Rights. It further details the appearances of the Committee before legislative public hearings regarding bills related to the works of the Committee in behalf of women. As an example of the nature of these activities it would suffice to mention:

> A. Three-day forum on *America seen through its Women Judges*, in which women judges of Venezuela, Chile, Nicaragua, United States, and Puerto Rico participated and explored the role of women in the Judicial System of their respective countries.

B. The Committee's works before the Legislature in support of bills seeking to establish day-care centers in factories and industrial centers.

C. Three-day forum on the rights of women workers. The forum was addressed to unions and women's organizations. Approximately 1,000 persons came to the forum.

D. Forums on Family Law and on Women and Literature.

28. This exhibit contains a summary of the works of the Electoral Process Committee during 1984. This Committee was created by the Board of Governors to enhance the level of political debate in our country, to enforce the laws governing the voting process and to frame a code of ethics to regulate public debate among political candidates.

The Committee, whose members are attorneys of all political persuasions, held hearings. Most of the candidates to high-ranking public offices attended these hearings. The Committee published a Code of Electoral Ethics in all the island newspapers, some of which wrote editorials congratulating the Bar Association's work and exhorting the candidates to observe the rules laid down in the Code of Ethics. The importance of this work is evinced by the participation of such entities as the Catholic Church, the Evangelical Council, the Medical Association, the Engineers' Association, the Pharmaceutical Association, the Chemists' Association, the Dentists and Dental Surgeons' Association, the Designers' Association, the Rotary Club, and the Endowment for the Humanities.

29. Report of the Committee for the Evaluation of Judicial Appointments. This exhibit contains a relation of the works of the Committee between 1979 and 1984, among others, the annual evaluation of hundreds of candidates for judgeships, appearances before the Puerto Rico Senate Appointment Committee, regarding the confirmation of judicial appointments made by the Governor.

The Committee continuously and systematically evaluates candidates to the Bench. Besides, during a judicial conference, the Committee presented a paper on *The Selection of Judges in Puerto Rico*.

30. Report of the Committee on Group Legal Plans and Insurance Committee. This exhibit relates the efforts performed from 1976 up to now regarding the establishment of a life insurance plan for bar members. Presently, each bar member has a life insurance for $15,000, entitled to double compensation in case of accidental death.

For years the Committee has been studying the possibility of establishing some prepaid group legal services plan.

31. Report of the Committee on Notarial and Registry Law from 1978 to 1984. The Committee took part in the 2nd International Congress on Mortgage Law in Madrid (1974), in the National Forum on Notarial and Registry Law in Neiva, Colombia (1976), in the 9th Panamerican Encounter in San Jose, Costa Rica (1976), in the 2nd International Congress on Mortgage Law held in Puerto Rico (1977). In 1978, 1979, and 1980, it held a series of seminars on the Mortgage Law Draft Bill and then, on the Mortgage Law and its Regulations, once approved. During these years it was engaged in several legislative endeavors related to the Mortgage Law draft bills. In 1981 it organized a series of seminars, and in 1982 and 1984 it took part in the International Congress on Mortgage Law.

32. Report of the Committee on Criminal Law. This exhibit is a summary of the work done by the Committee on Criminal Law since 1979.

In 1979, the Committee held the National Congress Against Crime. The First Meeting, held on February 7, 1979, included a series of forums and lectures on *The Impact of Mass Media on Criminality in Puerto Rico*. The Second Meeting, held on September 19, 1979, dealt with the subject *Rehabilitation* vs. *Punishment: the Function of the Penal System*. The central theme of the Third Meeting, held on October 10, 1979, was *The Known and the Unknown Criminality: A Case Study*.

The Fourth Meeting, held on October 24, 1979, revolved around the *Legal Professionals and Human Conduct*, it focused on the problem of juvenile delinquency. The Fifth Meeting had to do with *Criminal Bail and Judicial Discretion*.

From 1982 thru 1984 the Committee offered legal assistance to inmates, took care of inmates' complaints against the Correction Administration, participated in legislative hearings on draft bills dealing with Criminal Law, Criminal Procedure and Evidence Law, represented indigents before the Supreme Court, prepared a report to the Board of Governors entitled "Fixing Bail in Absentia" and advised the President of the Bar Association in the area of Criminal Law.

33. Report of the Committee on Human and Constitutional Rights from 1976 to 1984. During this period this Committee prepared a report on the *Rights of the Blind to Secret Vote*. Another report was made dealing with a complaint filed by Jehovah's Witnesses in a case in which one of the church members was subject to a blood transfusion against his will. The Committee also made another report on the practice of wire tapping by the Puerto Rico Telephone Company, and another one on the Civil Rights of the blind students of the Instituto Loaiza Cordero. It participated in several television programs touching on the legal condition of women, the constitutional right to bail, and draft bills having to do with bill posting. It appeared before the Legislative Houses to discuss several bills affecting the civil rights of the citizenry.

34. This exhibit is a summary of the work of the Labor Law Committee from 1979 to 1984. In 1979 the Committee conducted a study on the bill on the syndicalization of public employees, and heard consultations drawn by the Legal Advice Committee and by the Executive Director of the institution.

In 1980, the Committee cosponsored, together with the Committee Against Discrimination by Reason of Sex, a seminar and workshop on the problems faced by women in their workplace. It also took part in a seminar sponsored by the

Council on Education and Community Rights. In 1981, it submitted to the Legislature several reports on three (3) bills dealing with the rights of employees in case of removal from employment. In 1982 it began publishing, every three months, the *Labor Law Newsletter*. It organized a syndical conference, cosponsored a conference on the working woman and organized a seminar on Labor Law.

In 1983, it prepared a bill on the Closing Law for the Legislature of Puerto Rico; participated in a panel on the syndicalization of public employees; and testified in several legislative hearings.

In 1984, it participated in a seminar on the prosecution of labor grievanced before the courts, and on several aspects of the new labor legislation. It heard consultations on the labor legislation pending before the consideration of the Legislature and presented to the Legislature a paper on the Closing Law.

35. Committee for the Study of the Working Conditions of Attorneys in the Public Service. This exhibit contains a relation of the work performed by the Special Committee between 1976 and 1980, seeking to improve the working conditions of attorneys in the public service.

It published the following reports:

On the Guarantee of Tenure for Attorneys in the Public Service (1976); On the Recruitment, Promotion, Salaries and Salary Review Rules for Attorneys in the Public Service (1978); On Paralegal Techniques and their Role in the Government (1978); On the Uniform Compensation Act (1979); and On the Activities of the Committee which resulted in a $50 to $150 monthly salary increase for attorneys in the public service.

36. This exhibit describes the work of the Committee for the Study of the Constitutional Development of Puerto Rico from 1977 to 1984. During this period the Committee has published, among others, the following reports: Procedural Requirements for Decolonization (1977); Current Situation of the Decolonization Process in Puerto Rico and the Case of Puerto Rico before the United Nations Decolonization Com-

mittee (1979); Extrinsic Factors Affecting the Constitutional System of Puerto Rico (1981); and The Urgency of Reforming the Police Force to Protect Democracy (1984).

37. This exhibit contains a summary of the work performed by the Ethics Committee from 1976 to 1984. The report shows that hundreds of complaints were dealt with every year through systematic meetings held every week. According to the report, during this period from June 1982 to May 1984, the Committee dealt with more than 1,016 active cases involving complaints and consultations, it solved 543 matters, and left 473 pending.

The Bar Association, as a consequence of the work of the Committee, submitted 18 cases before the Supreme Court. The Committee presented another 12 cases before the Board of Governors of the institution. The Committee held 36 regular sessions, 10 special sessions, and 25 hearings, in which it dealt with 170 cases. It also published a brochure for general public orientation on professional ethics.

38. This exhibit contains the following reports presented by a series of miscellaneous committees:

a. Special report on the amendment to Rule 11 of the Rules of the Supreme Court of Puerto Rico.

b. Final report of the Committee on Restructuring of the Bar Association.

c. Report on the investigation conducted by the Committee for Jail Reform in the Humacao Jail,

ch. Preliminary Report on the Committee on the Conflict between the Residents of Vieques and the United States Navy.

d. Memorandum on the Annual Report of Work and Projects for 1985 filed by the Committee on Consumer Affairs.

e. Report of the Committee in charge of the Review of the Commerce Code.

f. Report of the activities held by the Special Committee for Producing Public Service Programs, during the period between October 17 and December 31, 1979.
g. Report of the work performed by the Organizing Committee of the 21st Conference of the Interamerican Federation of Lawyers.
h. Semiannual report of the Committee on Taxation Law, up to March 31, 1979.
i. Report of the Committee on Legal Advice to the Community.
j. Reports of the Committee for the Study and Review of the Bar Association Personnel Regulations.
k. Report of the Special Committee on Nuclear Armament and the Nuclear Arms Ban Treaty in Latin America.
l. Report of the Committee on Scholarships and Public Assistance.
ll. Report of the Committee for the Study of the Operation of the San Juan Judicial Center.
m. Report on the Appointment of a Special Committee for Investigating Press Attacks on Distinguished Lawyers.
n. Report of the Committee for the Study of the Proposed Territorial Demarcation of the San Juan and Rio Piedras Delegations.
n. Report on the works performed by the Special Committee with regard to the possibility of acquiring the Campo Chico lot in the Caguas Barrio Rio Canas to open a Vacational and Recreational Center for the Bar Association and possibly a Home for Retired Lawyers (Egida de Abogados).
o. Report of the Committee for establishing the Home for Retired Lawyers.
p. Memorandum — Report of the Committee on the Resolution in the case of Julio Irving Rodriguez Torres.
q. Letter reporting the achievements of the Committee to Help and Advise Lawyers.

r. Report on the Committee to Help and Advise Lawyers.

s. Minutes of the meeting of September 23, 1983, of the Committee on the Relationship between Judges, Prosecuting Attorneys, Registrars and Attorneys.

t. Minutes of the meeting of October 19, 1983, of the above-mentioned Committee.

u. Minutes of the November 16, 1983 meeting of the above-mentioned Committee.

v. Minutes of the December 14, 1983 meeting of the above-mentioned Committee.

w. Minutes of the January 18, 1984 meeting of the above-mentioned Committee.

x. Letter of attorney Melvin A. Padilla, dated January 13, 1984.

y. Letter of Luis V. Castro addressed to attorney Arturo Negron Garcia, of January 31, 1984.

z. Minutes of the February 16, 1984 meeting of the Committee on the Relationship between Judges, Prosecuting Attorneys, Registrars, and Attorneys.

aa. Report on an incident which allegedly took place in case No. 75-208, before the Superior Court, San Juan Part, between the Hon. Wilfredo Roberts and attorney R. R. Rivera Correa.

bb. Report of the Committee to Study the Legal Situation of the Panama Canal.

cc. Memorandum of the Committee to Seek Jobs for Unemployed Attorneys and New Bar Members.

39. This exhibit contains an outline of the work of the Legislation Committee as prepared by its chairperson, Atty. Georgina Candal Segurola, plus letters and an account of other professional activities. With regard to the work of this Committee, Atty. Candal testified broadly during the hearings held on January 22, 1985, Tr. Ev., pp. 135-166.

40. This exhibit contains a series of reports on the work of the Legal Education and Professional Improvement Committee, through its Institute of Practical Education from 1978 to 1984. It states its myriad activities, to wit: lectures, forums, and organization of review courses for the bar examination twice a year.

41. This exhibit contains a sample of the Assembly programs from 1978 to 1984.

42. This exhibit contains copies of the resolutions adopted by the General Assembly of the Bar Association of September 6, 1980, to wit:

> Resolution No. 1 — "The desirability that the Board of Governors takes steps to acquire the lot that abuts on the east with the Bar Association's property in Miramar."
> Resolution No. 2 — "To censure the indifference of the pertinent authorities towards the state of the prisons and the violation of the constitutional and human rights of inmates. It asks the Government to establish adequate security measures, humane treatment of inmates, and offers the collaboration of the Bar Association for the improvement of the prison system."
> Resolution No. 3 — "States the Bar Association's concern for the discrimination against women and expresses the Bar Association's availability to defend women's rights in all aspects of Puerto Rican life."
> Resolution No. 4 — "Recognizes the student chapter of the Bar Association represented by the National Association of Law Students."

43. This exhibit contains the report of the Resolutions Committee appointed by the President of the Bar Association, and certified copies of the nine (9) resolutions approved by the Assembly in 1982, to wit:

> Resolution No. 1 — "Asks the Board of Governors of the Bar Association to reevaluate its decision to drop from the

International Union of the Latin Notarial Profession. It commissions the Board of Governors to reinstate the Bar Association as a member of said International Union of the Latin Notarial Profession."

Resolution No. 2 — "To create a Standing Committee of Finance, Planning, Budget and Use of Resources in the Bar Association."

Resolution No. 3 — "To censure the legislative process that culminated in the approval of acts No. 3, 4, 5, and 6 of August 12, 1982, increasing court, deed, and Property Registry fees, in a surprising manner and without holding hearings."

Resolution No. 4 — "Condemns the prohibition imposed by the government of the United States on the citizens of Puerto Rico who wanted to attend the 14th Panamerican and Caribbean games to be held in Habana, Cuba."

Resolution No. 5 — "Establishes that the office of Executive Director must be held by an attorney admitted to the practice of the profession."

Resolution No. 6 — "Asks the Secretary of Justice to investigate the allegations and alterations with regard to the minutes of the meetings held by the Institute of Puerto Rican Culture."

Resolution No. 7 — "States the Bar Association's concern for the climate of tension pervading international relations and condemns the arms race, it also expresses concern for the threat of nuclear armaments to Puerto Rico and asks for the appointment of a Committee for studying the Treaty of Tlatelolco, and the impact of nuclear weapons on the health, environment, economy, etc., of Puerto Rico."

44. This exhibit contains the resolutions adopted in the 1983 Assembly, to wit:

Resolution No. 1 — "To designate the sources of income to be used to pay life insurance expenses for bar members, to

establish that from now on said life insurance shall be paid with the proceeds from 80% of the bar stamps and from the funds coming from the remaining 20% of the bar stamps, in other words, from the total proceeds from the sale of bar stamps plus ⅔ of the funds coming from the sale of notarial stamps. If there is a surplus in the sources mentioned above, the same shall be used for the same public service purposes that by law must be paid from the proceeds from the sale of notarial stamps. This resolution provided further that if the sources of income were not sufficient to pay the life insurance premium, then whatever funds are necessary shall be taken from the proceeds from the membership dues."

Resolution No. 2 — "Asks the House of Representatives to postpone the approval of Senate Bill No. 534 — 'To regulate the practice of the notarial profession in Puerto Rico.'"

Resolution No. 3 — "Extends the recognition of the institution to colleagues Jose Portuondo y de Castro, Hector Reichard Cardona, and Pedro Mantellini for the valuable services they have rendered in behalf of the profession."

Resolution No. 4 — "Reaffirms the will of the institution that the Federal Court should be removed from Puerto Rico. Expresses the Bar Association's concern for the intemperate behavior of some of the Federal Court judges in Puerto Rico and states its concern for the way in which the conduct of such judges discredits our Supreme Court, our Legislative Assembly, and the Bar Association."

45. This exhibit contains a report of the work of the Resolutions Committee of the General Assembly held on September 7, 1984, and copies of the resolutions adopted by the Assembly, to wit:

Resolution No. 1 — "Stating the Bar Association's opposition to the appointment of the Hon. Juan R. Torruella, as

Judge of the Court of Appeals for the First Circuit, because even though his judicial actions are free from personalities and criteria foreign to the judicial process, in controversies tinged with an ideological character he cannot overcome his personal beliefs."

Resolution No. 2 — "Accepts the recommendations of the report submitted by the 'Special Committee on Nuclear Armaments and the Treaty to Ban Nuclear Arms from Latin America' and asks the Committee to continue examining all aspects of nuclear arms and installations in Puerto Rico in order to render the pertinent reports."

Resolution No. 3 — "Asks the Legislative Assembly to approve a measure to eliminate the requirement of two attesting witnesses in affidavits and to limit such requirement to the use of only one witness."

Resolution No. 5 — "Supports Senate Bill No. 693 and House Bill No. 1024 which provides that the Office of Administrative Direction of the Property Registry be transferred to the Judicial Branch."

Resolution No. 6 — "States the institution's concern for the indiscriminate search and frisk practice of attorneys at the San Juan Judicial Center and at the United States District Court for the District of Puerto Rico."

Resolution No. 7 — "States the institution's rejection of the conduct of the Secretary of Justice, Atty. Nelson Martinez Acosta, and presses for his removal from office and for the investigation of his professional conduct by the Bar Association's Ethics Committee."

Resolution No. 8 — "Rejects the unjustified intervention of the Federal Court in the determination of eligibility of the athletes who will take part in the sports activities under the jurisdiction of Puerto Rico's Olympics Committee."

Resolution No. 10 — "Congratulates the American Bar Association, Atty. Luis F. Camacho, Atty. Arturo Negron Garcia, Atty. Jorge Segarra Olivero, Atty. Maria

Ines Cartagena, and the attorneys and employees of the Pro Bono Program for their collaboration in the success of the project which received the 'Harrison Tweed Award' in the American Bar Association's convention, held in Chicago."

46. This exhibit contains a list of the resolutions of the Board of Governors issued during the presidency of Atty. Luis F. Camacho (1980-1982).

47. This exhibit contains a relation of the resolutions issued by the Board of Governors during the presidency of Atty. Angel L. Tapia Flores (1978-1980).

48. This exhibit contains a relation of the resolutions issued by the Board of Governors during the presidency of Atty. Arturo Negron Garcia (1982-1984).

49. This exhibit contains a relation of the expenses incurred from 1977 to 1984 during the general assemblies of the Bar Association; a relation of the expenses incurred to pay the life insurance premiums of the bar members from 1981 to 1984, and contains further the total of annual expenses of the institution from 1977 to 1984. The financial information mentioned above can be summarized as follows:

Year	*Assembly Expenses*	*Life Insurance Expenses*	*Annual Disbursements***
1977	9,067.00	*	462,023.00
1978	31,097.00	*	547,574.00
1979	19,197.00	*	561,715.00
1980	23,087.00	*	781,071.00
1981	30,542.00	417,576.00	1,204,908.00
1982	33,287.00	472,403.00	1,496,995.00
1983	29,428.00	484,549.00	1,415,980.00
1984	55,453.00***	464,016.46	1,248,895.69

*During these years the life insurance was not accounted for as an expense but was reflected as a charge against the insurance fund. This fund comprised 55% of the proceeds from membership dues and 80% of the proceeds from the sale of bar stamps.

**From 1981 on, the life insurance payments for bar members were acknowledged as an expense, reason why yearly disbursements increased sharply.

***Without Auditing

50. This exhibit contains a series of documents dealing with the debt of the Foundation with the Bar Association.

51. This exhibit contains a copy of four draft bills that were part of the legislative program of the Bar Association, to wit:

(A) House Bill No. 233 which authorizes the Board of Governors to set the date for the Annual Assemblies of the Bar Association and for the elections of the District delegates.

(B) House Bill No. 232 which confers the Bar Association and its Ethics Committee additional powers to investigate complaints made with regard to the conduct of the members of the Institution in the practice of their profession.

(C) House Bill No. 231 which authorizes an increase — from $2,500 to not less than $20,000 — of the notarial bond to be posted by notaries to guarantee strict compliance with their obligations.

(D) House Bill No. 230 to create the Foundation for Legal and Humanistic Investigations of the Bar Association and for other purposes.

52. This exhibit contains a list of the expenses ($148,545.11) incurred by the Bar Association up to January 15, 1985, as a result of the proceedings in this case.

53. This exhibit contains a list of the costs of the work performed in the Bar Association printing shop, with regard to the publication of the opinions of the Supreme Court of Puerto Rico during 1984 ($85,316.79). This represents an approximate annual cost of $22.45 for the service rendered to each bar member.

54. This exhibit contains the Regulations of the Review Board of the activities of the Bar Association of Puerto Rico, as amended.

55. This exhibit contains a statement of the expenses incurred by the Bar Association between 1977 and 1984, in the publication of the Bar Association Law Review, in the publication of "Toga" or "Factum" reviews, and the cost of the appearances made by the President of the Bar Association before the United Nations by resolution of the Board of Governors of said institution. The contents of the exhibit may be summarized as follows:

Year	*Bar Association Law Review*	*Toga or Factum*	*United Nations*	*Year's Total*
1977	35,103.00	789.00	0.00	35,892.00
1978	31,030.00	7,643.20	769.89	39,443.09
1979	47,258.00	3,780.00	1,421.00	52,459.00
1980	59,021.00	11,786.00	2,049.29	72,856.29
1981	54,962.00	8,065.11	3,081.70	66,108.81
1982	55,695.00	19,579.69	3,148.53	78,423.22
1983	30,569.00	8,676.66	0.00	39,245.66
1984	0.00	3,732.17	934.06	4,666.23

Justices Negron Garcia, Rebollo Lopez, and Naveira de Rodon disqualified themselves.

APPENDIX K

[1] IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Nos. 82-1459(TR); 82-1513; 82-1514; 82-1532

ROBERT E. SCHNEIDER,

v.

JORGE F. ROMANY,

v.

ORESTE V. RAMOS DIAZ,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO, ET AL.

HEARING RE: PLAINTIFFS CLAIM FOR ATTORNEYS' FEES

Whereupon, the above-captioned cause came to be heard before the HONORABLE JUAN R. TORRUELLA, United States Circuit Court Judge, sitting be designation in San Jaun, Puerto Rico, on Friday, May 19, 1989, at 10:10 a.m.

* * *

[9] the Court to make a decision on the appeal before your Honor makes a determination on the pending request for attorneys' fees.

THE COURT: There is another point, and that's the following: That if appellees prevail on the appeal, or I should say on part of it, they would also be entitled to the additional attorneys' fees and we would have to hold another hearing.

MR. ANDUZE: That is probably so, your Honor. They are also— well, they are also cross-appellants, so I feel that if they do lose their cross-appeal, they might be liable for attorneys' fees too.

THE COURT: Would you like to be heard?

MR. SCHNEIDER: As your Honor correctly states, there are additional fees that are subject to request depending on the outcome of the appeal.

We— our position is that the— regardless of the outcome of the appeal, that we have obtained a substantial improvement in the— in our— based on our position and our case by the fact— by the very fact that the Supreme Court did decide that the remedy that originally had been set up was inadequate and came up with a different remedy providing different terms, even if those are not acceptable, that we have achieved substantially what we were after, regardless of what the outcome of the appeal may be. So that we would be entitled to [10] attorneys' fees, at least on that basis.

THE COURT: But that's a closer issue, isn't it, than if you win the appeal? If you win the appeal, then we don't even have to get into these nuances.

MR. SCHNEIDER: That's right.

THE COURT: Well, is your position that I should still go ahead now and decide this or wait until the appeal is decided?

It sounds to me like the appeal is going to be much longer. I mean, in the sense that it would seem to me that if things go— when are the briefs due?

MR. SCHNEIDER: Well, your Honor, we have filed a brief as cross-appellants. The Justice Department has filed a brief as appellants and the Colegio is due to file their brief—

MR. ANDUZE: We are due to file our brief in response to Mr. Schneider's brief and in support of our appeal.

THE COURT: Well, let me ask this: When is the last brief due?

MR. SCHNEIDER: The last brief, we have asked to answer the appellants' brief 30 days after the Colegio's brief.

MR. ANDUZE: We will file our brief sometime next week, and then Mr. Schneider has 30 days to reply to both our

. . .

APPENDIX L

4 LPRA § 774. Membership required for practice of law

After the first general convention of the Bar Association, no person who is not a member thereof shall practice law in this Commonwealth.

4 LPRA § 775. Eligibility for membership

All attorneys-at-law who are admitted to practice in the Supreme Court of Puerto Rico and who comply with the duties hereby determined for them shall be members of the Bar Association.

4 LPRA § 781. Suspension on failure to pay dues

Any member who fails to pay his dues, though otherwise qualified as a member of the Association, shall be suspended as such member, but may be reinstated on payment of his debt on this account.

4 LPRA § 783. Bar Association stamps

It shall be the duty of every attorney at law to affix to the initial document filed by him in any judicial action or proceedings a stamp to be adopted and issued by the Bar Association, of the denomination of one (1) dollar; and said initial document shall not be filed until the said stamp is affixed thereto.

APPENDIX M

4 LPRA § 1006. Instruments, copies and protocols; internal revenue stamps; Bar Association stamps

Notaries shall draw up original instruments, issue copies thereof, and form their own protocols. It shall be the duty of every notary to affix to and cancel on each original deed executed and on the copies thereof issued by him the proper internal revenue stamps and a stamp to be adopted and issued by the Bar Association of Puerto Rico of a value of twenty five (25) cents, when the value of the object of the deed is less than $4,000.00 or a stamp of one (1) dollar when the value is more than $4,000.00, the proceeds of the sale of said stamps to be covered into the funds of said Association. Any original instrument or copy thereof to which said stamps have not been affixed shall be considered null for such purposes. Notaries of Legal Services of Puerto Rico, Inc., shall not be found to affix and cancel the stamps to which this section refers, when they execute deeds of indigent persons, following the criteria of eligibility established by said agency. The cost of the stamps of the Bar Association shall be defrayed by the notary. The notary may not charge the clients with the cost of the stamps of the Bar Association. Provided, that the Bar Association of Puerto Rico shall be bound to devote at least one third (⅓) of the total of the revenues received for this reason to community service programs such as free legal assistance to indigent persons, continuous community legal education programs, and other analogous programs.

Provided, further, that it shall be the duty of every notary before whom any conveyance of an ownership title is executed, whose amount exceeds twenty-five thousand (25,000) dollars, to remit to the Secretary of the Treasury, not later than the Monday immediately following the date of execution, a true and correct copy of said deed, with his signature and notarial certificate, and with each one of the folios marked

and sealed, but without attaching thereto internal-revenue stamps or the notarial tax. The sending of said copy shall not be required when the title conveyance is made by the Commonwealth, its agencies, instrumentalities, or municipalities, or by the government of the United States, its agencies or instrumentalities.

4 LPRA § 1038. Inspection of notarial offices; Director of Protocols Inspection and protocol inspectors; disciplinary fines and suspension

The inspection of notarial offices and the examination of protocols shall be in charge of the Chief Justice of the Supreme Court of Puerto Rico. The Chief Justice shall appoint a Director of Protocols Inspector and three or more experience notaries, as protocol inspectors, all of whom shall be covered by the provisions of sections 521-525 of this title, known as the Judicial Branch Personnel Act, and of the rules and regulations adopted thereunder. One of such protocol inspectors shall reside in the district of San Juan, another in the district of Ponce, and the other shall reside where the Chief Justice may designate. The Supreme Court shall, through the Director of Protocols Inspection, allocate among the inspectors, as it may deem advisable, the work of examination of protocols in the different districts of the Commonwealth.

Protocol inspectors shall act under the direction of the Chief Justice and shall perform the duties and obligations he may assign to them, it being their duty to visit at least once a year all notarial offices, for which purpose notaries shall place their protocols and registers of affidavits at the disposal of any of them for examination in their notarial offices all working days from 8:00 a.m. to 12:00 p.m. and from 1:00 p.m. to 5:00 p.m. Upon inspecting the protocols of a notary, the inspector shall state in a brief memorandum over his signature and immediately following the last instrument in each volume of the protocols examined, the condition in which he has found them

and the date of the inspection. Once through with said inspection, the inspector shall submit to the Chief Justice a written report setting forth the result of the examination, the state of preservation of the protocols, whether they are kept in accordance with law, whether the provisions of this chapter and of any other applicable law were complied with at the time of execution of the instruments making up the protocols, and whether internal revenue stamps in the amount of the fees the Commonwealth of Puerto Rico should receive in accordance with the notarial tariff, as well as the proper bar stamps of the Bar Association of Puerto Rico, appear affixed to and cancelled on the original instruments in the protocols.

The power herein granted to protocol inspectors shall not extend to protocols already examined and approved by the former district judges.

If any disagreement should arise between the protocol inspector and the notary in the course of an inspection, as to the form and manner in which the latter keeps his protocols and register of affidavits, or with respect to the compliance with any other provisions of this chapter or of any other law of Puerto Rico, including those on notarial tariff, the inspector shall so state in his report, briefly reciting the facts and the grounds of the controversy, which report shall be submitted to the part of the Superior Court of the place where the notary practices his profession, so that said court may, upon hearing both the inspector and the notary, decide the controversy, which decision shall be reviewable by the Supreme Court through a writ of certiorari requested within ten days after service of notice.

The Supreme Court of Puerto Rico may, after giving the notary an opportunity to be heard in his defense, discipline him through a reprimand, a fine not to exceed five hundred (500) dollars, or temporary or permanent suspension from office, for any violation of the provisions of this chapter or any other law relative to the practice of the notarial profession. Both the Supreme Court and the Chief Justice may delegate

to the Director of Protocols Inspection any functions relative to the supervision of notaries and the practice of the notarial profession they may deem advisable, excepting the power to impose disciplinary sanctions.

FILED
MAY 21 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1470
No. 90-1513

COLEGIO DE ABOGADOS DE PUERTO RICO,
and
CARMEN ANA CULPEPER, ET AL.,

PETITIONERS,

v.

ROBERT E. SCHNEIDER; HECTOR RAMOS; ORESTE V. RAMOS; JORGE F. ROMANY, AND JORGE SOUSS

RESPONDENTS.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS JOINT AND CONSOLIDATED RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI

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In the
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RESPONDENTS JOINT AND CONSOLIDATED RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI

SUMMARY OF ARGUMENT

Petitioners ask this Court to review, on jurisdictional and procedural grounds, the decision of the Court of Appeals for the First Circuit, affirming in part the decision of the District Court. They do not question the decision on the merits. All of the issues they raise have raised and argued and resolved more than once in the District Court and in the Court of Appeals and no substantial reasons are alleged for further review of these same issues by this Court.

The issues of want of jurisdiction, *res judicata* and lack of case or controversy were first raised in 1982 and have since then been raised and argued and resolved again and again. This time the petitioners seek to buttress their position by misstating the facts in a vain effort to circumvent the principal barriers to their claims for dismissal on these grounds. This Court should deny any petition based on these grounds and should call to account any party resorting to such tactics.

The other arguments raised by petitioners as grounds for the issuance of the writs lack substance or sufficient importance to merit review by this Court.

PARTIES

The parties in the proceedings now pending before this Court are the Colegio de Abogados de Puerto Rico (the "Colegio"), petitioner in case number 90-1470 and cross-respondent in case number 90-1651; the Secretaries of Justice and of the Treasury of the Commonwealth of Puerto Rico (the "Secretaries"), petitioners in case number 90-1513 and cross-respondents in case number 90-1651; and the Justices (the "Justices") of the Supreme Court of the Commonwealth of Puerto Rico (the "State Court") on the one side and, on the other side, Hector R. Ramos and Robert E. Schneider, Jr. ("Ramos & Schneider"), Oreste V. Ramos ("Oreste"), Jorge F. Romany ("Romany") and Jorge Souss ("Souss"), respondents (the "Respondents") in cases number 90-1470 and 90-1513 and cross-petitioners in case number 90-1651.

STATEMENT OF THE CASE

This controversy commenced on June 9, 1982 with the filing of a civil rights action for declaratory and injunctive relief and damages by Ramos & Schneider in the U.S. District Court for the District of Puerto Rico, the "District Court"), against the Colegio, the Secretaries and the Justices, challenging, among others, on federal constitutional grounds, the compulsory bar membership and funding system imposed by the laws of Puerto Rico and the use of public facilities to sell Colegio stamps without charge to the Colegio. Later in the same month similar actions were filed in the District Court by Oreste, Romany and Souss against the same defendants and all of these action were later consolidated, the "Consolidated Actions").

This controversy has been the subject of three opinions by the U.S. Court of Appeals for the First Circuit (the "Court of Appeals"), and five (not four as stated by the Secretaries at page 3 of their petition) opinions and orders by the District Court. In chronological order the decisions of the Court of Appeals and of the District Court are as follows:

District Court Opinion of September 13, 1982 (the "1982 Jurisdiction Decision") reported at 546 F. Supp. 1251 (1982) denying the motions to dismiss the Consolidated Actions for want of

jurisdiction under the holding in *Rooker v Fidelity Trust Co.*, 263 U.S. 413 (1923) ("*Rooker*"); on *res judicata* grounds; under Article III of the U. S. Constitution, for failing to present an adjudicative controversy, and, as to Colegio stamps, as barred by the *Tax Injunction Act*, 28 U.S.C. Section 1341, and the *Butler Act*, 48 U.S.C. Section 872, filed by the Justices and the Colegio, and the motion to dismiss the claims as to Colegio stamps as barred by the *Tax Injunction Act* and the *Butler Act*, filed by the Secretaries.

Court of Appeals Opinion of December 8, 1982 (the "*1982 Court of Appeals Decision*"), reported at 695 F.2d 17, denying the petitions of the Justices and of the Colegio for writs of mandamus for the dismissal of the Consolidated Actions for want of jurisdiction under *Rooker*; on *res judicata* grounds; under Article III of the U.S. Constitution for failing to present an adjudicative controversy and, with respect to Colegio stamps, as barred by the *Tax Injunction Act* and the *Butler Act* and granting in part the Justices petition for a writ of mandamus for dismissal for failing to state a claim against them except as to Colegio stamps issue as to which the Justices were to continue as nominal parties. The Secretaries did not file any petition for writ of mandamus, were not parties to, and did not participate in *1982 Court of Appeals Decision*.

District Court Opinion and Judgment of June 16, 1983 (the "*1983 District Court Judgment*"), reported at 565 F. Supp. 963 in the Consolidated Actions holding that the laws of Puerto Rico that imposed the compulsory bar membership and funding system and required that public facilities be used to sell Colegio stamps without charge to the Colegio, as interpreted, enforced and applied, violated speech and associational rights guaranteed by the First Amendment to the U.S. Constitution and were contrary to either the Fifth or the Fourteenth Amendments, and granting declaratory and injunctive relief against the Colegio and the Secretaries and damages against the Colegio.

District Court Opinion, Order and Amended Judgment of June 30, 1983 (the "*1983 District Court Order*"), reported at 572 F. Supp. 957 denying the Colegio's motion for stay of the *1983 District Court Judgment* and ordering the amendment of the *1983 District Court Judgment* to show that there was no bar to the voluntary payment of

Colegio membership dues or to the voluntary purchase of Colegio stamps by lawyers.

Court of Appeals Opinion of August 23, 1984 (the "*1984 Court of Appeals Decision*"), reported at 742 F.2d 32, on the appeal filed by the Colegio to the *1983 District Court Judgment*, as amended by the *1983 District Court Order*, holding that the District Court should have abstained from acting while still retaining jurisdiction because the State Court had not yet completed its remedial action having issued a resolution after the *1983 District Court Judgment* stating that the remedy adopted by the Colegio was still before its consideration pending approval, modification or rejection, and vacating the *1983 District Court Judgment* and remanding the case for proceedings not inconsistent with the *1984 Court of Appeals Decision*.

District Court Opinion and Order of August 21, 1987 (the "*1987 Jurisdiction Decision*"), reported at 670 F. Supp. 1098, denying the Colegio's motion to dismiss the Consolidated Actions for want of jurisdiction under *Rooker*; on *res judicata* grounds, and for failing to present a case or controversy.

District Court Opinion and Judgment of March 3, 1988 (the "*1988 District Court Judgment*"), reported at 682 F. Supp. 674, in the Consolidated Actions, holding that the laws of Puerto Rico that imposed the compulsory bar membership and funding system, as interpreted, enforced and applied, violated speech and associational rights guaranteed by the First Amendment to the U.S. Constitution and were contrary to either the Fifth or the Fourteenth Amendments; granting declaratory and injunctive relief against the Colegio and the Secretaries and damages against the Colegio, and denying Respondents challenge to the use of public facilities to sell Colegio stamps without charge for lack of taxpayer standing.

Court of Appeals Opinion of October 24, 1990 (the "*1990 Court of Appeals Decision*"), reported at 917 F.2d. 620, on the appeals filed by the Colegio and the Secretaries from the *1988 District Court Judgment*, affirming that judgment as to damages awarded against the Colegio and the injunctive relief granted but delaying implementation of injunctive relief for six months to give the Colegio an opportunity to modify the system to protect dissenters rights so as to resolve the constitutional problems identified in the opinion,

reversing the *1988 District Court Judgment* as to the use of the proceeds from the sale of Colegio stamps.

In November of 1977, prior to the filing of the Consolidated Action, the Colegio filed an action for disbarment (the "1977 Disbarment Action"), in the State Court against 99 lawyers, including Ramos & Schneider and Romany, for failing to pay their arrears in Colegio compulsory dues. Romany paid his arrears in compulsory dues in 1978 and thereafter was eliminated as a party in the 1977 Disbarment Action. Respondents Souss and Oreste were never included as parties in the 1977 Disbarment Action. Contrary to the assertions of the Colegio, at pages 2 and 10 of their petition, and of the Secretaries, at page 4 of their petition, the 1977 Disbarment Action never did include all five of the Respondents herein.

Ramos & Schneider, the only Respondents who were parties in the 1977 Disbarment Action, challenged, under the laws and Constitution of Puerto Rico, those laws of Puerto Rico that compelled all-lawyers, including acting judges in the local courts and in the Federal courts, as condition to the right to practice law in Puerto Rico, to be members of and fund the Colegio by the compulsory payment of dues and purchase of Colegio stamps and the use by the Colegio of the funds they were compelled to contribute to it for ideological and political ends. On April 5, 1982, more than five years later, after many incidents involving contradictory State Court orders and frustrated attempts at discovery, the State Court finally issued its Opinion and Judgment (the "*1982 State Court Decision*"), reported at 112 D.P.R. 540, upholding the validity and constitutionality, under the laws and constitution of Puerto Rico, of the Colegio compulsory membership and funding system; holding that the Colegio had the right and obligation to engage in political and ideological activity "for the social advancement of the community," because, according to the majority opinion of Chief Justice Trias Monge, of its very special mission in converting Puerto Rico's traditionally monolithic milieu to a pluralistic society, recognizing, however, a limited but not retroactive right of lawyers to object to the use for ideological ends unrelated to the Colegio statutory purposes, of the compulsory dues paid by lawyers to the Colegio; directing the Colegio to adopt a method, following the guidelines set forth in the *1982 State Court Decision* and "heeding the principles laid down in *Street, Allen and*

Abood," although these made "no definitive pronouncement on this prickly problem," for such objecting lawyers to seek partial refunds of future payments of compulsory dues of the portion used by the Colegio for ideological ends they objected to, and ordering all parties in the 1977 Disbarment Action, including Ramos & Schneider, but none of the other three Respondents in these cases, to pay their arrears in Colegio compulsory dues or be disbarred. Associate Justice Negron Garcia, who, on June 16, 1982, disqualified himself from any future participation in the case because he was the brother of attorney Arturo Negron Garcia, one of the lawyers who represented the Colegio in the 1977 Disbarment Action and a past and future president of the Colegio and member of its Council of Presidents, wrote a concurring opinion on April 5, 1982 in the 1977 Disbarment Action, holding that the elimination of the compulsory Colegio for its past or present errors was not justified in a "pluralistic society" such as existed in Puerto Rico.

The Colegio in May of 1982 filed a motion in the State Court naming 17 lawyers who were parties to the 1977 Disbarment Action, including Ramos & Schneider but none of the other three Respondents herein, who were still in arrears in the payment of Colegio compulsory dues and asking the State Court to proceed against these 17 in accordance with the *1982 State Court Decision*. By Order of June 3, 1982, the State Court, noting that the *1982 State Court Decision* was final and firm, disbarred Ramos & Schneider for non-payment of their arrears in Colegio compulsory dues but took no action whatsoever against the other 15 lawyers named by Colegio in its May, 1982 motion as parties in the 1977 Disbarment Action and subject to sanction under the *1982 State Court Decision* for non-payment of their Colegio compulsory dues.

In 1985, after the *1984 Court of Appeals Decision* vacating the *1983 District Court Judgment* and ordering the District Court to stay its hand "while retaining jurisdiction, to allow the State Court a reasonable time within which to review the Colegio's remedy, and to accept, reject or modify it, the State Court, at the request of the Colegio, held extensive hearings (the "1985 State Court Hearings"), before a special master, a former Associate Justice of the State Court and dues paying, good-standing member of the Colegio, to hear testimony of the Colegio. These hearings were scheduled by the State

Court under the same case number as the 1977 Disbarment Action and Ramos & Schneider were duly notified of the 1985 State Court Hearings as if they were parties to the proceedings, although at all times they informed the State Court and the Special Master that they appeared and took part in the 1985 State Court Hearings not as parties nor in an adversary capacity because the adjudicative action against them in the 1977 Disbarment Action ended with the *1982 State Court Decision* and their subsequent disbarment in execution and enforcement of said *1982 State Court Decision*, but as observers in order to assist in the drafting of an acceptable remedy.

The attorney for Respondents Oreste, Romany and Souss, who were never parties in the 1977 Disbarment Action, was notified of the 1985 State Hearings and appeared at the first hearing, a preliminary hearing held before the special master in January of 1985 as part of the 1985 State Court Hearings. At this preliminary hearing Respondents Oreste, Romany and Souss announced that they were not and had never been parties to the 1977 Disbarment Action and that they had appeared as a matter of courtesy on being notified of the hearing; the Colegio announced that those who were not parties, who had no interest and who came to the hearing as a matter of courtesy should be free; Respondents Oreste, Romany and Souss then asked the special master to be relieved of further participation in the proceedings, and the special master then relieved and excused these three Respondents from further participation in the 1985 State Court Hearings. This is incorrectly characterized by the Colegio, at page 4 of their petition, and by the Secretaries, at pages 6 and 17 of their petition, as the refusal of Respondents Oreste, Romany and Souss to participate in the 1985 State Court Hearing, although the Secretaries do concede, at footnote 6 on page 6 of their petition, that, in its June 26, 1986 ruling adopting the new Colegio remedy (the "*1986 Remedy*"), reported at 117 D.P.R. 504, the State Court stated that Respondents Oreste, Romany and Souss requested to be relieved from further participation in the 1985 State Court Hearings and that this request was granted, and the Colegio, at page 16 of its petition, and the Secretaries, at page 17 of their petition, incorrectly conclude that, because of such refusal, Respondents Oreste, Romany and Souss "simply waived their rights and implicitly agreed to" the *1986 Remedy*.

REASONS FOR DENYING THE WRIT

THE ROOKER-FELDMAN AND THE RES JUDICATA ISSUES WERE CORRECTLY DECIDED BY THE DISTRICT COURT AND BY THE COURT OF APPEALS.

It is true that throughout the long history of this case the Colegio has argued many times that the holding in *Rooker* and its progeny bars the exercise of jurisdiction by District Court in the Consolidated Actions and that these cases should be dismissed on *res judicata* grounds, but this has not been its "unflagging position."

Unfortunately, the same cannot be said for the Secretaries and their assertion on page 10 of their petition that, "throughout the long history of this case it has been (their) unflagging position" is just not true. For the Secretaries it is only the second time that they have raised these issues, the first time being in their appeal of the *1988 District Court Judgment* and now in their petition before this Court.

In 1982 the Justices and the Colegio moved in the District Court for the dismissal of the Consolidated Actions for lack of jurisdiction based on the *Rooker* doctrine and on *res judicata* grounds. The District Court in the 1982 Jurisdiction Decision denied dismissal on these grounds. The Secretaries did file a motion to dismiss in 1982 "but limited to the issues raised by the *Tax Injunction Act* and the *Butler Act*," none of which issues has been raised here, which motion was also denied in the 1982 Jurisdiction Decision.

The Justices again moved for dismissal for lack of jurisdiction under *Rooker* and on *res judicata* grounds in their 1982 petition for writ of mandamus in the Court of Appeals, which was denied in the *1982 Court of Appeals Decision*. The Colegio also filed a petition for writ of mandamus with the Court of Appeals in 1982 but on the same grounds, which petition was denied in the *1982 Court of Appeals Decision*

The Secretaries did not participate in the 1982 mandamus proceedings before the Court of Appeals.

The same issues were raised again by the Colegio in the District Court at the conclusion of the 1983 trial and before judgment and were again rejected by the District Court. No such issues were raised by the Secretaries at that time.

The Colegio did not argue for dismissal on the grounds of *Rooker* and on *res judicata* grounds in their appeal from the *1983 District Court Judgment*, and in the *1984 Court of Appeals Decision* it is noted at footnote 6 on page 37 that the Colegio had not challenged the 1982 Jurisdiction Decision denying dismissal on these grounds.

The Secretaries did not take any appeal from the *1983 District Court Judgment* and in their memorandum of law after the 1983 District Court trial they expressly stated that, "[i]nsofar, then, as plaintiff's claim in [those cases] may involve a general challenge to the constitutionality of Law 43 of May 14th, 1932, 4 L.P.R.A. 771 et seq., claiming that it is an encroachment of individual rights under the First and Fourteenth Amendments to the United States Constitution; and a general challenge to the constitutionality of Law 99 of June 7th, 1956, 4 L.P.R.A. 851, claiming that they are in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution, said challenges fall under the jurisdiction of this Honorable Court."

In the 1987 proceedings before the District Court the Colegio again sought dismissal on the basis of *Rooker* and on *res judicata* grounds, which dismissal was again denied in the *1987 Jurisdiction Decision*. The Secretaries did not file any motion for dismissal on these grounds with the District Court.

In their appeals from the *1988 District Court Judgment* both the Colegio and the Secretaries again raised the issues of lack of jurisdiction under *Rooker* and of *res judicata*, both of which had been resolved by the District Court in its 1982 Jurisdiction Decision and again in its *1987 Jurisdiction Decision*. And now, the Colegio and the Secretaries again raise the same issues on their petitions for writs of certiorari.

Both the Colegio and the Secretaries attempt to avoid the major stumbling block to their jurisdiction and *res judicata* claims by incorrectly stating in their respective statements of the case (the Colegio at page at page 2 and again at the bottom of page 10; the Secretaries at page 4) that the action filed in the State Court by the Colegio was against the five Respondents herein when in fact only two of the five Respondents were parties in the State Court action. The Colegio and the Secretaries not only misstate the facts when they claim that all five Respondents were parties in the 1977 Disbarment

Action filed by the Colegio with the State Court but they also misstate the facts when they assert (the Colegio at page 4 and the Secretaries at page 6 and 15) that Respondents Oreste Ramos, Jorge Souss and Jorge Romany refused to participate in the 1985 State Court Hearings. As the Court of Appeals correctly noted in the *1990 Court of Appeals Decision* at 628-629 "a contrary conclusion on the (jurisdiction issue) would have little impact on this litigation because only two of the plaintiffs were parties in the state court; thus, even if jurisdiction were improper as to them, the case would continue on behalf of the remaining plaintiffs."

The Colegio and the Secretaries in their efforts to characterize the 1985 State Court Hearings and the *1986 Remedy* as adjudicative by asserting that Ramos & Schneider participated in the 1985 State Court Hearings in an adversary capacity, raising "objections to the Colegio's proposed findings of fact and conclusions of law" and presenting "their own counterproposal of findings of fact and conclusions of law." At the preliminary hearing held in January of 1985 in the 1985 State Court Hearings, Attorney Negron Garcia, on behalf of the Colegio stated that the hearing was to give Respondents "participation in the formulation of a remedy which, it appears to me, is all that is in issue here today. And the hearing before Your Honor is basically the presentation of the evidence that may be necessary to design a remedy. That is, the Court at this time is not adjudicating if membership is compulsory or not compulsory, or if it should or should not be, or if the 'Colegio de Abogados' is going to take part in ideological activities or not. The Supreme Court already decided. That, this has been adjudicated by the Supreme Court of Puerto Rico. What appears to me to be the issue is to design a remedy...."

Ramos & Schneider at all stages of the 1985 State Court Hearings informed the State Court and the Special Master that they did not appear as parties or in an adversary capacity because the adjudicative proceedings against them initiated with the 1977 Disbarment Action had terminated with the *1982 State Court Decision*. Ramos & Schneider submitted their comments and corrections to the proposed findings of fact and remedy submitted by the Colegio in the 1985 Hearings. They submitted no conclusions of law because the State Court had clearly stated that the function of the Special Master was to receive the evidence and submit a report of his findings of fact.

THE DECISION OF THE COURT OF APPEALS DOES NOT VIOLATE ANY OF THE PRINCIPLES OF COMITY OR OF FEDERALISM

Petitioners have presented no compelling argument to merit the issuance of the requested writs on the grounds of alleged violations of the principles of Comity and Federalism.

The Secretaries, in their petition on this point, cite the words of Justice O'Connor to the effect that there "is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions." The issue of a 'hospitable forum' has never been raised in this case and yet it is interesting to note that all of the Justices of the State Court who acted in this case, were at all times, dues paying, good-standing members of the Colegio and one Justice, at the time that he issued a concurring opinion in the State Court, was the brother of one of the lawyers representing the Colegio before the State Court; that the Special Masters named by the State Court were all dues paying, good-standing members of the Colegio; that the State Court imposed the sanction of disbarment under the *1982 State Court Decision* on only two of the 17 lawyers who were in arrears in the payment of Colegio compulsory dues and were parties to the 1977 Disbarment Action, on the only two who challenged the compulsory membership and funding system, and that the two former State Court Justices who were named by the State Court to the Review Board of Colegio ideological activities and were objected to by Respondents because they had participated as Justices in the *1982 State Court Decision* subsequently resigned from the Review Board stating that they should not act on the Review Board because they had participated as Justices in the *1982 State Court Decision.*

NO OTHER ISSUES HAVE BEEN RAISED BY PETITIONERS THAT JUSTIFY THE ISSUANCE OF THE WRITS

The Petitioners have raised other issues in their petitions but none with any substance or sufficiently important to merit review by this Court. They are treated as side or secondary issues by Petitioners and should be treated in the same way by this Court.

CONCLUSION

None of the issues raised by Petitioners merit review by this court. The petitions of the Colegio and of the Secretaries for writs of certiorari should be denied.

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Respectfully submitted,

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